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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 842

SIM L. NICHOLS,

Petitioner,

vs.

UNITED STATES STEEL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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In the Supreme Court of the United States

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SIM L. NICHOLS,

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UNITED STATES STEEL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on January 25, 1956.

OPINIONS BELOW.

The opinion of the District Court (R. 382a-393a) is reported under the title of *Nichols vs. National Tube Company*, 122 Fed. Supp. 726, and is printed *infra*, pp. 39-49; the opinion of the District Court on motion to amend findings and for additional findings (R. 400a) appears *infra*, pp. 50-51.

The opinion of the Court of Appeals is reported under the title of *United States Steel Corporation v. Nichols*, 229 F. 2d 396, and is printed *infra*, pp. 27-38.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered on January 25, 1956. Motion to rehear *en banc* and petition for rehearing were filed February 11, 1956. Petition for rehearing denied and motion to rehear *en banc* overruled on February 29, 1956.

The jurisdiction of this Court is invoked under Title 28, U. S. C. Section 1254.

QUESTIONS PRESENTED.

1. While there is in effect a collective bargaining contract negotiated under the provisions of the National Labor Relations Act, containing a seniority clause protecting tenure of employment and specifying the grounds upon which employment may be terminated and a management clause vesting in management the right to discharge for proper cause or relieve from duty for other legitimate reason, and the employer has unsuccessfully bargained to have included in the contract a clause permitting compulsory termination of employment at age 65 (concededly a matter for collective bargaining), does the employer still retain his common law right to terminate employment for any cause, and particularly for a reason not specified in the contract, i.e., that the employee has reached age 65?*

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* This question also raises the corollary questions:

(a) Is reaching age 65 a legitimate reason for relieving an employee from duty or is it a proper cause for discharge under such contract?

(b) Is not termination of employment because of age 65 under such contract without any pension, annuity or other economic provision, in fact, a discharge rather than retirement?

(c) May an employee, whose tenure of employment is protected by such contract, be discharged by the simple expedient of saying he has been retired?

2. Does a plan or policy of compulsory termination of employment at age 65, unilaterally adopted by the employer, which confers no rights upon the employees, have any legal status unless it meets the requirements of the law of usage and custom, which are: (a) it must be long established without interruption, (b) known to those affected, and (c) acquiesced in by the persons affected?

3. Assuming such plan or custom of termination of employment at age 65 is legally sufficient, can it vary the terms of an unambiguous contract?

4. Must not such contract be construed and interpreted in accordance with local law?

STATUTE INVOLVED.

The pertinent statutory provisions are printed in Appendix A, *infra*, pp. 24-25.

STATEMENT.

Sim L. Nichols, on July 17, 1950, brought an action for damages for breach of a collective bargaining contract against his employer, National Tube Company, in the Court of Common Pleas, Lorain County, Ohio, claiming his employment had been wrongfully terminated in violation of the labor agreement. The employer caused the case to be removed to the United States District Court for the Northern District of Ohio on ground of diversity of citizenship.

After the action was commenced, National Tube Company merged with the United States Steel Corporation, which was substituted as party defendant.

The labor contract involved was executed on March 13, 1945 between the Company and United Steelworkers of America—C. I. O., which had been certified as the collective bargaining agent for defendant's Lorain plant on

July 31, 1942, pursuant to the National Labor Relations Act.

The contract contained a seniority clause (Section 8) relating to tenure and termination of employment, which protected the seniority rights of employees with the longest continuous service, so long as they were physically fit and able to perform their job (Pl. Ex. 1; R. 287a). It also contained a management clause (Section 10) vesting in management the right to discharge employees for proper cause and to relieve employees from duty for other legitimate reasons (Pl. Ex. 1; R. 299a).

Nichols was first employed at the National Tube Company in 1917 and was continuously employed since 1918. His employment was terminated on May 17, 1946, with a two-week notice, because of age 65, without pension.

Nichols contends that the seniority clause of the collective bargaining contract protecting his tenure of employment and, specifying the grounds upon which his continuous employment may be terminated, fixes his right to his job and that his employment cannot be terminated except in accordance therewith; that age 65 is not one of the grounds specified in the contract for termination of employment and, therefore, to terminate his employment for that reason is a violation of the contract.

The Company claims (a) that the grounds for termination of employment specified in the contract are not exclusive and despite the provisions of the contract it retains its common law right to terminate employment for other causes, including the right to terminate employment because of age 65; (b) that Nichols was retired and that the contract contains no provision relating to retirement; (c) that Nichols was retired under its long established policy of compulsory retirement at 65. (The company

does not claim that the contract grants or reserves the right of compulsory retirement at age 65.)

To these contentions of the employer, Nichols replies: (a) that the employer's common law right to terminate employment for any cause no longer exists by reason of the provisions of the seniority clause and management clause of the contract specifying the grounds upon which employment may be terminated, and that under the management clause, age 65 is neither a proper cause for discharge nor a legitimate reason to relieve him from duty; (b) that he was not retired, that he was, in fact, discharged; that there was no pension, annuity or other economic provision made for him by his employer; (c) that the Company had no long established policy of compulsory retirement at age 65; (d) that he had no knowledge or notice of the so-called plan of compulsory retirement or its terms and conditions; that he never acquiesced in it; (e) that the plan does not meet the requirements of the law of usage and custom; (f) that the contract is unambiguous in that it specifies the only grounds for compulsory termination of employment and age 65, not being specified, is excluded.

The case was tried in the District Court, commencing April 15, 1954. During the course of the trial, the jury was waived and the case was submitted to the trial judge. The District Judge rendered a Memorandum Opinion which was adopted as Findings of Fact and Conclusions of Law (R. 382a-393a), which was supplemented by his Opinion on the defendant's Motion to Amend the Findings and for Additional Findings (R. 400a). Chief Judge Jones found: (1) that tenure and termination of employment were among the most important objects, purposes and provisions of the contract (R. 388a); (2) that if management

desired and intended to retain a compulsory retirement practice, it should have reserved that method of termination of employment in the contract or notified its employees of its intention with respect to such a policy (R. 388a); (3) that the legal and practical effect of compulsory retirement is the same as discharge and was in violation of the plaintiff's contract rights (R. 391a). Chief Judge Jones assessed plaintiff's damages at $25,000.00 and entered judgment therefor.

On appeal, in an opinion rendered by Judge Miller and concurred in by Judge Allen, the Court of Appeals for the Sixth Circuit reversed the District Court, holding: (1) that the contract, although it specifies certain grounds for termination of employment, does not restrict the employer's common law right to terminate employment for other causes; (2) that the employer had a bona fide policy of retirement at age 65 under which it was justified in terminating Nichols' employment notwithstanding the contract; (3) that notice to or knowledge by Nichols of the plan of compulsory retirement at age 65 was not essential; (4) that the Union was within its rights in refusing to agree to a compulsory retirement clause, which was proposed by the Company in the collective bargaining sessions, and the Union never acquiesced in such policy. Judge Martin dissented, stating that he would affirm the judgment of Chief Judge Paul Jones of the District Court upon the basis of the reasoning contained in his opinion published in 122 F. Supp. 726.

A petition for rehearing was duly filed, together with a motion to rehear *en banc*. The motion was overruled and the petition was denied. Judge Martin was of the opinion that the petition for rehearing should be granted.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Sixth Circuit erred:

1. In making findings of fact contrary to those made by the District Court without first determining that the findings of the District Court were clearly erroneous.

2. In making findings of fact not supported by the evidence.

3. In holding that, in employer-employee relations, compulsory termination of employment because of age 65, without pension, is retirement.

4. In holding that, where a collective bargaining contract negotiated under the provisions of the National Labor Relations Act specifies the grounds for termination of employment, employment may be terminated for a ground not so specified, i.e., age 65.

5. In holding that the employer who unsuccessfully bargained to have written into the labor contract a clause permitting compulsory termination of employment at age 65, concededly a matter for collective bargaining, nevertheless retains such right as a common law prerogative.

6. In holding that a plan or policy of compulsory termination of employment because of age 65 may be superimposed upon the contract although the evidence does not disclose it to be long established without interruption, and although it was unknown to the employees and not acquiesced in by them and its terms and conditions were unknown to the Union.

7. In holding that the plan or policy of termination of employment at age 65 could vary the terms of the unambiguous contract.

8. In failing to consider or apply the Ohio law in the interpretation of the contract.

9. In failing to consider or apply the Ohio law with relation to custom as affects the plan or policy of compulsory retirement at age 65.

10. In reversing the judgment of the District Court.

11. In overruling plaintiff's petition for rehearing.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below in the instant case is in direct conflict with the decision rendered by the Court of Appeals for the Seventh Circuit in the case of *United Protective Workers of America and Orloski vs. Ford Motor Co.*, first reported in 194 F. 2d 997 (March 14, 1952), and on second appeal reported in 223 F. 2d 49 (May 20, 1955). The collective bargaining contract in the *Ford Motor* case contains seniority and management clauses which are essentially similar to those contained in the contract in this case. In the *Ford Motor* case, Orloski contended that his employment had been terminated at age 65 in violation of his contract rights.

(a) In that case, as in the case at bar, the employer urged a common law right to compulsorily retire employees at age 65, and that this right was not restricted by the collective bargaining agreement.

The Court of Appeals for the Seventh Circuit rejected both of these contentions of the employer and ruled that since the seniority clause of the contract specified the grounds for termination of employment, all other grounds were excluded.

The Court of Appeals for the Sixth Circuit, in the instant case, comes to the opposite conclusion.

(b) Ford Motor contended that the contract contained no provision in the seniority clause, or elsewhere, entitling Orloski to be retained in his employment. The Appellate Court ruled that the contract expressly provides that the employee may be discharged only for cause and that compulsory retirement of the employee by his employer accomplishes the same result, employment is terminated, and held that an employer may not terminate an employee's employment without cause by the simple expedient of saying that the employee had been retired.

In the instant case, the Appellate Court ruled that although the end result of discharge and compulsory retirement because of age 65 are the same, there is a distinction in the meaning of the words and that Nichols was not discharged but was retired, even though he received no benefits in connection therewith.

(c) On the second trial and on the second appeal of the *Ford Motor* case, the primary issue was Ford's defense that Orloski was retired pursuant to the company's established policy of compulsory retirement at 65. The trial court found that Ford had such a policy,* that Orloski was receiving benefits from it, but that neither Orloski nor the Union were ever apprised of the *terms* of the compulsory retirement plan and, therefore, the plan did not justify Orloski's dismissal. The Appellate Court held:

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* District Judge Campbell made a finding that Ford had instituted its policy of compulsory retirement on June 21, 1945; that its plan was published and distributed among its employees; that Orloski joined the plan in 1947 and contributed thereto; that Orloski never received a published copy and that he was discharged in 1949 but was never apprised of Ford's intention to dismiss or retire him when he reached 65; that neither Orloski nor the Union was informed of the terms of the annuity contract between Ford Motor and Equitable Life Assurance Society which provided the pension involved.

> "In the absence of knowledge of or consent to the Company's alleged policy of compulsory retirement, there is no basis for holding that Orloski waived his right, under the collective bargaining agreement, to be discharged only for cause. Nichols v. National Tube Co., D. C., 122 F. Supp. 726, 732." *United Protective Workers v. Ford Motor Co.*, 223 F. 2d 49, at 51.

In the instant case, the evidence tending to show an established plan of compulsory retirement at age 65, is far less favorable to the employer than the evidence in the *Ford Motor* case.*

The Court below found that there was a well established, bona fide retirement plan, despite the evidence of its limited existence and the lack of evidence of the essential elements of a bona fide retirement plan. It made no comment on the stipulation that plaintiff received no pension and that the plan conferred no rights on its employees.

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* The National Tube Company unilaterally instituted its plan of compulsory retirement at age 65 in 1941. The plan was never published. Its terms were never disclosed, even at the trial. Neither Nichols nor the Union were ever informed of the terms of the plan. It is admitted that there is no provision for a pension or other economic security for the employee in the plan. The so-called plan apparently consists of nothing more than dismissal from employment at age 65. The Union knew there was some sort of a plan from complaints which came to it from members, on behalf of whom grievances were filed on grounds of termination of employment because of age 65 (R. 219a-222a). Nichols testified that his understanding of the plan was that after 25 years of service, at his option, he might retire on a pension, concerning which pension plan he had no information. (R. 58a-59a). Abram B. Cashner (R. 246a), Peter Karesic (R. 250a), Charles A. Kiser (R. 252a-253a), Peter Stiliha (R. 256a), John Radman (R. 259a) all testified similarly.

A flexible policy of compulsory retirement between 65 and 70, discretionary with the local superintendent, was established by a confidential letter dated May 4, 1931, from B. C. Moise, Vice-President, to E. W. Brown, General Superintendent, Lorain plant. (D. Ex. J, R. 362a, 133a.)

Neither policy appears to have been established by action of the directors or stockholders of the Company (R. 74a).

It further found that knowledge or notice on the part of Nichols was not necessary.*

(d) The Court below in discussing the *Ford Motor* case states, "Some general language in the first opinion of the Court of Appeals (p. 1003) supports appellee's position," *infra*, p. 37, but attempts to distinguish the cases by implying that in the re-trial Ford Motor failed to demonstrate that it had an established retirement plan. This interpretation is not warranted. The Court of Appeals for the Seventh Circuit in its second opinion at page 51 said that, in the absence of knowledge or consent to the plan, Orloski did not waive his right under the contract to be dismissed only for cause. If there had been no finding of an established plan, the question of knowledge or notice thereof could not arise. The District Judge likewise found that the plan did not justify Orloski's discharge *in the absence of proof of his knowledge of its terms.* There was an established plan and Orloski not only knew of the plan, he contributed to it.

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* Apparently based on its finding that "The Union officials knew about the policy and its enforcement at the time of the execution of the contract." (Opinion *infra* p. 37.) As to enforcement, according to the defendant's witness Hobby, the Company, on January 1, 1941, definitely fixed age 65 as retirement age. This continued to September, 1942, when, the war being on, the Company considered it to be to its interest to continue in their employment men past 65 who were physically fit, and this situation prevailed on March 13, 1945 and continued to August 18, 1945 (R. 139a-140a). As to knowledge by Union officials, they *knew about the policy* but *did not know what its terms were*, nor that it was uniformly enforced. As to local Union officials, they learned of the policy and its enforcement through grievances filed by certain members (R. 213a-217a, 221a). As to the international Union, David J. McDonald, its president, testified that he did not know that after the war "the Company regularly compulsorily retired people at an attained age." (R. 280a-281a.) He specifically denied acquiescence (273a) and stated the Union's position was that the Company did not have such right because of its failure to get it into the contract (R. 269a-276a).

There is no escape from the fundamental conflict in the decisions of these two Appellate Courts. The Seventh Circuit holds that (1) the employee has the right under the contract to be discharged only for cause, (2) compulsory retirement at age 65 is discharge without proper cause in violation of the labor agreement, and (3) there can be no waiver of the employee's contract right to be discharged only for proper cause, where he has no knowledge of the terms of the compulsory retirement plan. The Sixth Circuit holds (1) that compulsory retirement at age 65 is not discharge and is not covered by the labor contract, and (2) that knowledge of or consent to the Company's policy of compulsory retirement at age 65 by the employee is not required.

The second appeal in the *Ford Motor* case was decided while the appeal in this case was pending. The Seventh Circuit, in holding that notice to the employee is essential, cites as authority the opinion of Chief Judge Jones in the case at bar.

The Sixth Circuit has reversed Chief Judge Jones on this specific point.

We thus find the law in this amazing state: That the decision rendered by the District Court in the case at bar has been cited with approval and has now become the law for the Seventh Circuit. In the Sixth Circuit, where it was rendered, it is overruled.

It is an unusual situation which would seem to call for the exercise of the authority of this Honorable Court so that the conflict may be resolved and the confusion ended.

2. The contract interpretation involved in this case has been considered by Ohio courts. There are two decisions directly in point and both conflict with the ruling of the court below in the instant case:

National Association of Machinists v. Electric Vacuum Cleaner Division, General Electric Company, 72 Ohio Law Abstract 257, 24 L. R. R. M. 2527 (1949) (Court of Common Pleas, Cuyahoga County, Ohio);*

State, ex rel. v. Toledo, 142 O. S. 123 (1943).

(a) In the *General Electric* case, the employees claimed that the seniority clause specified the grounds for termination of employment, including discharge for cause, and that the company's so-called plan of compulsory retirement at age 65 was, in fact, discharge. The company urged that it had a common law right to terminate employment because of age 65; that interpreting the contract within its four corners, the contract did not limit that right;

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* An appeal was filed, Case No. 3265, in the Court of Appeals for Cuyahoga County, but was later dismissed by the appellant.

In *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179 (1940), this Honorable Court reversed the Court of Appeals for the Sixth Circuit for failing to follow the Ohio law as announced by the Ohio Court of Appeals.

In *King v. Order of United Commercial Travelers*, 333 U. S. 153, 68 S. Ct. 488 (1948) it was held that the United States Court of Appeals for the Fourth Circuit was not required to follow the decision of the South Carolina Common Pleas Court, pointing out however that the Common Pleas decisions of South Carolina are not published or digested in any form whatsoever; the opinion further cautioned that it was not to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts.

In Ohio the publication of Common Pleas Court opinions is an established practice. See 1 O. Jur. p. XV—XXIV—Ohio Case Law. Common Pleas decisions are profusely cited as authority in Ohio Jurisprudence and Ohio Jurisprudence Second. An inspection of Shepard's Ohio Citations shows the frequency with which Ohio Common Pleas decisions are cited by Ohio Appellate Courts. Under an arrangement with the Ohio State Bar Association, the Ohio Law Abstract attempts to report all unofficial Court of Appeals decisions and all Common Pleas Court decisions which are made available. Common Pleas decisions are also currently reported in Ohio Opinions and are digested in West's Ohio Digest and Page's Ohio Digest.

that termination of employment because of age 65 was not discharge but retirement. The Court first considered the meaning of the word "retirement" and held that in employer-employee relations there must be some consent on the part of the employee, either by specific agreement or by participation in a pension plan, but that under the facts of the case, the company's action constituted not retirement but discharge because of age. In the case at bar, the Appellate Court called it compulsory retirement at 65 without considering whether it was a retirement plan in fact or merely a guise to avert the consequences of the contract.

Concerning the company's assertion of common law right to terminate employment for any cause, the Ohio Court held that the contract prohibits termination of continuous service except as specified, relying on the old legal maxim, "Expressio unius est exclusio alterius."

The Appellate Court, in the case at bar, holds that if the Union wanted to prohibit compulsory retirement at age 65, it should have insisted upon such a clause in the contract.* In the *General Electric* case, as in the case at bar, the company had unsuccessfully sought to have a clause permitting compulsory retirement at age 65 included in the contract. The Ohio Common Pleas Court held that the omission of the company sought clause permitting com-

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* The Court below found that "no contention was made that such issue was already covered by the existing section dealing with the rights of management." (*infra*, p. 34.) David McDonald, president of the United Steelworkers of America, testified: "I think the Management clause restricts them—does not grant them the right to retire people." (R. 276a.)

The Union never sought to have a clause restricting the right included in the contract; it contended that because of the contract the Company did not have the right. The Company sought unsuccessfully to have such a clause included in the 1941, 1942, 1945 contracts (R. 278a). The Company in 1948 abandoned any further attempt to carry out this policy (R. 201a).

pulsory retirement at age 65 fortified its conclusion that the company had no such right, which is diametrically opposite to the conclusion reached by the Appellate Court in the instant case.

(b) In the *Toledo* case, the Supreme Court of Ohio had to determine whether an ordinance of the City of Toledo, which provided for compulsory retirement of police and firemen at age 65, was in violation of the provisions of the state civil service laws fixing tenure of office during good behavior and efficient service. The city argued that it was not removal and, therefore, not within the purview of the statute. The Supreme Court of Ohio held that the statute having granted relator a specific tenure of office, any interference therewith, by a municipal authority, based upon an age limit or for any reason other than those specified in the statute, is invalid and that "by whatever name it may be called, removal or retirement, an ordinance interfering with such tenure is inconsistent with the provisions of the statute and cannot be sustained." This, we submit, is in direct conflict with the decision of the Court below in the case at bar which places greater emphasis on phraseology than upon the actual and factual results.

3. In its determination of this case, the Appellate Court gave no consideration to the Ohio law although the District Court cited the case of *National Association of Machinists v. Electric Vacuum Cleaner Division, General Electric Company, supra,* and although further Ohio authorities were cited in the plaintiff-appellee's briefs. This failure to consider and follow the Ohio law, we submit, is error on the basis of the rule stated in *Erie Railroad v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817 (1938). In the case of *Transcontinental & Western Air, Inc. v. Koppal,* 345 U. S. 653, 73 S. Ct. 906, decided June 1, 1953, it was determined that an action for damages for wrongful dis-

charge in violation of a collective bargaining agreement should be interpreted according to local law.

4. (a) The Court below has misconstrued the Labor Management Relations Act, Title 29, United States Code, Section 158(d), and has misconstrued the decision of this Honorable Court rendered in the case of *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, 62 S. Ct. 659 (1942).

The District Judge in the case at bar found that tenure and termination of employment were among the most important purposes and objects of the collective bargaining agreement and that, if management intended and desired to maintain a practice of compulsory retirement at age 65, it should have caused such a clause to be inserted into the contract, or at least given notice to the employees of its proposed policy (R. 388a); neither was done in this case. The Appellate Court reversed this conclusion of law reached by the District Court on the theory that it was contrary to Section 158(d) of the Labor Management Relations Act, stating that, under that section of the law, a collective bargaining agreement does not necessarily express the full coverage of employment rights but covers only those matters upon which parties have been able to agree, and for this construction of the statute it cites as authority the case of *Williams v. Jacksonville Terminal Co., supra.* The question involved in that case was whether the tips of the Redcaps should be construed as wages. There was involved a collective bargaining agreement of a limited scope, covering only hours of work and working conditions; it did not cover wages. Furthermore, the Terminal companies, before they put into effect their policy of requiring the Redcaps to account for their tips, gave each Redcap a written notice of the proposed plan. In the case at bar, tenure of employment is covered by the con-

tract and no notice of the plan of compulsory retirement at age 65, unilaterally adopted, was ever given to the Union or to the employees, and Nichols had no knowledge of the plan. We submit therefore that the *Williams* case has no application to the situation existing in the case at bar and does not sustain the Appellate Court's theory of retained rights. We further submit that there has been no decision rendered by this Honorable Court to the effect that, where a collective bargaining agreement covers seniority rights, there continue to exist additional undisclosed retained rights with relation to tenure of employment in either the employees or the employer. We submit that a collectively bargained labor agreement fixes the rights of the parties upon any subject it covers, and neither party retains rights which it sought unsuccessfully to have included.

We fully recognize that the National Labor Relations Act does not of itself restrict the employer's common law right to hire and fire at will, but where tenure of employment has been bargained upon and fixed by a seniority clause, the right to hire and fire must be governed by the provisions of the contract.

Seniority clauses appear in almost all labor contracts. Millions of workers in this country are covered by such contracts. Do they have the seniority rights which they appear to have under their contracts, or may their employers still claim undisclosed right or rights which they failed to obtain at the bargaining table? This is a question of such vast, national importance, and of such consequence to so many of our citizens, that it calls for clarification and determination by this Honorable Court.

The life span of the American people increases with every decade by reason of modern medicine and science. The seniority clauses of most labor contracts, apparently

give to the man with the greatest seniority a right to his job as long as he is in good health and able to perform the duties of his job, which is the language involved in the case at bar. Does this language mean what it says, or are the men who rely upon it, merely deluding themselves, and subject to a rude awakening when their employers come forth with some undisclosed and "retained" common law right of which the workers had no knowledge, to find themselves without employment, despite faithful service and unquestioned ability to perform the work? Age 65 may be reduced to age 60 or age 50.* The "retained" right may, under the theory of the Court below, be *any* cause not specifically prohibited by the contract.

(b) The decision of the Court below conflicts with the decision of the Court of Appeals for the Seventh Circuit in the case of *Inland Steel v. National Labor Relations Board*, 170 F. 2d 247 (7th Cir., 1948). Certiorari denied April 25, 1949, 336 U. S. 960.

The *Inland Steel* case holds that the National Labor Relations Act requires the employer to bargain on the subject of compulsory retirement or termination of employment because of age.

That subject was bargained upon. The Company proposed a clause providing for compulsory retirement; the Union did not agree. The Court below held, nevertheless,

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* What would be the purpose of protecting senior employees against lay-off when an employer could arbitrarily and unilaterally place the compulsory retirement age at any level which might suit its purpose? If the Company may fix an age at 65, there is nothing to prevent it from deciding that 50 or 45 is the age at which employees are no longer employable, and in this manner wholly frustrate the seniority protections for which the Union has bargained." *Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247, at 253. (7th Cir.) Certiorari denied, 336 U. S. 960, 69 S. Ct. 887, April 25, 1949.

that the right was retained by the employer, although an agreement was reached covering seniority rights, tenure and termination of employment, with the Company proposed compulsory retirement clause omitted.

The force and effect of this decision is to render the decision in the *Inland Steel* case meaningless.

If the employer is forced to bargain on the subject, yet retains the right although he fails at the bargaining table, what is the meaning and purpose of the bargaining? The employer wins even though he loses.

We submit that if the matter is one upon which the parties must bargain, there can be no retained rights therein. Any other conclusion makes the bargaining requirement a vain and futile thing. No employer would be inclined to bargain seriously if he knew that he still had what he was bargaining for, whether he won or lost. That the employer did not consider that he had such a retained right is evident from the fact that he repeatedly sought to have the clause included in the contract—and failed.

This is a fundamental problem in Labor-Management relations and the far reaching consequences of the decision are manifest. The conflict inherent in these decisions calls for the exercise of the supervisory jurisdiction of this Honorable Court.

5. (a) The Court below superimposed upon the unambiguous contract a usage or custom of the employer, i.e., its claimed policy of compulsory "retirement" at age 65. In so doing, it was in direct conflict with both federal and local law.

The rule is universal that a usage or custom cannot vary the terms of an unambiguous contract.

Barnard v. Kellogg, 10 Wallace 383, 19 L. Ed. 987 (1871);

Anson v. Hiram Walker, 222 F. 2d 100 (7th Cir., 1955);
Cincinnati v. Gas Co., 53 O. S. 278 (1895).

There was no finding that the contract is ambiguous.*

(b) Further, such policy or practice gains no legal status unless it be long continued without interruption, known to those affected and peaceably acquiesced in.

Steamboat v. Wayne, 16 Ohio 513 (1847);
55 *Am. Jur.*, 267, Usage & Custom.

The rule is well stated in the charge given to the jury in the leading case of *Somerby v. Tappan*, Wright's Ohio Reports 570 (Hamilton County Common Pleas, 1834).

And even if the policy of termination of employment at age 65 was well established, it still lacked the other essential elements of a custom or usage: it was interrupted for four of the six years of claimed operation. it was not known to the employees, it was not acquiesced in by the employees.

(c) The Court below construed the evidence as showing a "well established, bona fide retirement plan, which was found by the District Judge to have been in operation for a number of years prior to the retirement" of Nichols. The erroneous impression arises that the trial judge made a finding that there was a well established, bona fide retirement plan. He did not. Nor did Chief Judge Jones find that the retirement plan had been in operation for

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* In the presentation of the case of *National Assn. of Machinists v. Electric Vacuum Cleaner Division, General Electric Company* in the Common Pleas Court, counsel for General Electric, Squire, Sanders & Dempsey (counsel for United States Steel in the case at bar) urged that the contract was unambiguous and should be construed within its four corners and relied heavily upon the case of *Cincinnati v. Gas Co.*, 53 O. S. 278.

a number of years prior to the Nichols' discharge. The District Court's finding upon this subject was:

> "While there is evidence that the defendant had a somewhat flexible retirement policy from 1937 to 1941, the policy of compulsory retirement at 65 was adopted in 1941. However, it appears to have been suspended, or modified, during the war emergency. Thus, it will be seen that for four or more years of the existence of the alleged inflexible compulsory retirement policy the evidence is that the Company had modified the policy to the extent of retiring, stripped of rights, employees who had been shortly theretofore retired at 65. If plaintiff was supposed to have had some knowledge or implied understanding of a fixed retirement policy he could not, as it seems to me, be expected to understand that the Company had only temporarily, for the duration of the war emergency, departed from its compulsory retirement policy." (R. 269a.)

Could this finding of the District Judge be "clearly erroneous"* in view of the fact that one of the Appellate Judges voted to affirm on the basis of the finding of the trial judge?

The evidence does not justify a finding that there was in existence a well established retirement plan or a bona fide retirement plan. It was instituted in January, 1941, and discontinued in September, 1942 (R. 139a). It was reinstituted on August 18, 1945 (R. 140a). The plan was not in operation on March 13, 1945, when the contract was executed. It had been in operation for only 11 months prior to May 17, 1946, the date of Nichols' discharge.

It was not a bona fide retirement plan because it was not known by the employees or consented to by them or by

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*Rule 52(a), Federal Rules of Civil Procedure—District Courts.

the Union and most importantly *it lacked the one element absolutely essential* to any bona fide retirement plan—*economic provision* for the person being retired—by pension, annuity or otherwise.

6. This case presents questions whose resolution will have immediate and future importance far beyond the parties involved or the facts presented herein. There are presently pending, in the District Court for the Northern District of Ohio, five lawsuits brought by 59 plaintiffs, wherein the same issues are involved. Those cases are being held in abeyance pending the outcome of this case, which is being treated as a test case. If this petition for certiorari be not granted, the rights of those other parties appear to be foreclosed unless they dismiss and sue over again in some court in the Seventh Circuit. Their cases have been pending for over five years and at their advanced age (they are all over 73), and in view of the length of time it would take for their cases to come to trial if filed anew, it is doubtful whether many of these litigants would live to enjoy the fruits of their victory, if successful. Time is surely of the essence to these aged persons. Also, the expense of protracted litigation to men in their economic status is not to be overlooked.

Similar clauses as to seniority and management rights appear in many other labor contracts and the practice of termination of employment at age 65 now prevails in many other industries. The principle of law involved, that the seniority clause of the labor contract does not give to the employee the seeming protection that its language indicates, but that there may exist in the employer undisclosed, retained common law rights, rocks the very foundation of the security which workers have felt by reason of the writing into their collective bargaining contracts of such seniority clauses. The law with relation thereto has be-

come utterly confused by reason of the conflicting decisions rendered in this case and in the case of *United Protective Workers of America v. Ford Motor Co.*, 194 F. 2d 997 and 223 F. 2d 49. The filing of similar cases can reasonably be expected in the future and their ultimate outcome, unless this writ of certiorari is granted and the law settled, will be uncertain.

It is a situation which calls for consideration by this Honorable Court not only to redress the wrong which has been committed to the petitioner by reason of the erroneous decision of the Court below in the instant case, but also because of its importance to the many litigants in pending lawsuits and also because of the novelty and importance of the questions of law raised, in the field of labor relations. This case presents an opportunity for this Court to determine the rights of those many thousands of American citizens, who like Nichols have reached and are reaching "retirement" age (60, 65, 70), working under collective bargaining agreements containing seniority clauses protecting their jobs on the basis of continuous service, so long as they are physically fit and able to perform their work. Their rights will never be satisfactorily and completely settled and determined until the question is resolved by this Honorable Court.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB LEVIN,
ARNOLD S. LEVIN,
Counsel for Petitioner.

April 10, 1956.

APPENDIX A.

STATUTE INVOLVED.

Labor Management Relations Act, Title 29. U. S. Code Section 158(d):

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9(a) (§ 159(a) of this title), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended (§§ 158, 159, 160 of this title), but such loss of status for such employee shall terminate if and when he is reemployed by such employer. (July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101 in part, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601.)

APPENDIX B.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed January 25, 1956.)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed, and the case remanded for further proceedings consistent with the opinion filed herein.

ORDER DENYING REHEARING.

(Filed February 29, 1956.)

Appellee's petition for rehearing and his motion that the rehearing be heard en banc having been considered by the Court;

It is Ordered that the motion to rehear en banc is overruled; *N. L. R. B. v. Cambria Clay Products Co.*, No. 12,072, Order entered August 12, 1955; *Northwest Airlines, Inc. v. Glenn L. Martin Co.*, No. 12,130, Order entered October 3, 1955;

And it is further Ordered that the petition for rehearing be denied.

Judge Martin is of the opinion that the petition for rehearing should be granted for the reasons stated in the opinion of Chief Judge Paul Jones of the U. S. District Court, in which this case was tried.

APPENDIX C.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided January 25, 1956.)

Before ALLEN, MARTIN and MILLER, Circuit Judges.

MILLER, Circuit Judge. The appellee, Sim L. Nichols, filed this action for damages resulting from an alleged breach of a collective bargaining contract between the Union, of which he was a member, and the National Tube Company, by which he was employed. Following the merger of the National Tube Company with the United States Steel Corporation, the Steel Corporation was substituted as defendant. The case was heard by the District Judge without a jury. The District Judge gave judgment for the appellee in the amount of $25,000, from which this appeal was taken.

The facts for the most part are undisputed.

Nichols was first employed by the Company at its Lorain, Ohio, Plant on August 22, 1918, and thereafter was continuously employed from February 20, 1919 until May 31, 1946. He was one of the employees for whom the United States Steelworkers of America was the duly certified collective bargaining agent under the National Labor Relations Act. On March 13, 1945, the Union entered into a collective bargaining contract with the Company which was in full force and effect until after May 31, 1946. Under the terms of this contract, employees such as Nichols could be discharged only for proper cause and through a procedure set out in the contract. On May 17, 1946, the Company notified Nichols that having attained the age of 65 years he was being retired on May 31, 1946 in accordance with the Company's plan of compulsory retirement. Pursuant to such notice, Nichols' employment was terminated effective May 31, 1946.

Nichols filed this action on July 17, 1950, charging in his amended complaint that the Company did "without proper cause or legitimate reason therefor discharge the

plaintiff on May 31, 1946," and that said discharge was "for the reason that plaintiff had then attained the age of 65 years and for no other reason." The amended complaint also alleged that at the time of the discharge Nichols was physically fit and able to perform his work, and that the discharge constituted a breach of the contract of May 13, 1945.

The appellant, by its answer, admitted that the Union was the duly certified bargaining agent of the appellee, the execution of the contract of March 13, 1945, that the contract was in effect until after May 31, 1946, and that under the terms of the contract the plaintiff could be discharged only for cause and through the procedure specified in the contract. It claimed, however, that the appellee was not discharged, but was retired on May 31, 1946, in accordance with a plan of compulsory retirement of its employees which it had put into effect many years before the execution of the collective bargaining contract of May 13, 1945, and which it had openly enforced upon a uniform and non-discriminatory basis both before and after March 13, 1945, with the knowledge of the Union; that the appellee was barred from bringing this action because the collective bargaining contract provided a detailed administrative remedy, by way of a grievance and compulsory arbitration procedure, which the appellee had not used and which constituted a condition precedent to appellant's right to invoke the jurisdiction of the Court; and that appellee's claim was settled by the execution of an agreement on March 1, 1950, between the appellant and the Union as his bargaining agent.

Appellee by his reply denied that prior to May 31, 1946, there was in force and effect at appellant's plant at Lorain, Ohio, a plan of compulsory retirement of employees. While admitting that he had not invoked the grievance and arbitration procedure provided by the contract, he alleged that the appellant had always taken the position that compulsory retirement of an employee at the age of 65 was a right retained by the Company which

was not subject to the arbitration and grievance procedure provided by the bargaining contract, and that the Board of Conciliation and Arbitration established by the contract was without jurisdiction in the matter, by reason of which it was useless procedure on his part to attempt to arbitrate the claim.

The District Judge was of the opinion that a bargaining agreement expressed the complete obligations and rights of the parties relating to employees, including conditions and tenure of employment and conditions respecting means for termination of employment; that if some undisclosed rights in respect to employment are not included, or without notice to the employee are withheld, on the theory that they are not the subject of bargaining the contract does not express the full coverage of employment rights; that if management intended to retain a compulsory retirement practice it should have reserved that method of termination of employment in the contract or notified its employees of its purpose and intention in respect of such policy; and that it was not to be supposed that the employer could withhold an employment right not recorded or reserved by the contract. He found that while there was evidence that the appellant had a somewhat flexible retirement policy from 1931 to 1941, the policy of compulsory retirement at 65 was adopted in 1941 and was suspended or modified during the war emergency; that no representative of the Company or of the Union notified the appellee of such policy before the notice on May 17, 1946; that there was not sufficient evidence to charge the appellee with knowledge of the existence of the policy or to support a claim of his acquiescence in any such policy; and that the appellee was not bound by the acquiescence of Union leaders or representatives in such a policy which was not brought to his knowledge. He ruled that there was no question that the word "discharge" had a different meaning than "compulsory retirement"; that the appellee was not "discharged" in the usual and ordinary sense of the term; that the legal and practical effect of compulsory

retirement was the same as a discharge and that appellee's employment was effectively and forcibly terminated without any cause expressed or contemplated by the labor agreement; and that there was no contractual ground upon which appellant could base the forcible termination of appellee's contract. On the basis of these rulings he entered judgment for the appellee computing damages on the basis of what he would have earned under continued employment during his life expectancy of approximately seven years, credited by what amounts he had been able to earn since his retirement. 122 Fed. Supp. 726.

The first question presented by the foregoing analysis of the rights of the parties is whether it was necessary for the appellant in order to keep in effect its policy of compulsory retirement for age to provide in the contract for the retention of such right. That requires a consideration of the fundamental principles of the law of master and servant as changed or affected by the National Labor Relations Act.

The relationship of master and servant or employer and employee is not dependent upon a collective bargaining contract. It has existed for innumerable years, long before the origin of the modern-day collective bargaining agreements as provided and made effective by the National Labor Relations Act. The common law rights inherent in such relationship still exist except to the extent that they may be modified by legislation or by the specific contract between the employer and the employee. One of such common law rights is the right of the employer to select and hire his employees and to terminate the employment at will. That right was not abridged by the National Labor Relations Act or by any other statute applicable to the present case. *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1, 45; *N. L. R. B. v. West Ohio Gas Co.*, 172 F. (2d) 685, 688, C. A. 6th; *N. L. R. B. v. Tennessee Coach Co.*, 191 F. (2d) 546, 550, C. A. 6th; *N. L. R. B. v. Superior Co.*, 199 F. (2d) 39, 42, C. A. 6th.

It was the purpose of the National Labor Relations Act, as amended by the Labor Management Relations Act,

that the execution of collective bargaining agreements between employers and employees would result through the process of good faith collective bargaining. It is well settled, however, that the Act does not compel the making of any agreement whatsoever between the employer and employees, nor does it regulate the substantive terms governing wages, hours and working conditions which are involved in the bargaining and about which an agreement may be reached. *N. L. R. B. v. Jones & Laughlin, supra,* page 45; *N. L. R. B. v. American National Insurance Co.,* 343 U. S. 395, 402; *N. L. R. B. v. United Clay Mines Corp.,* 219 F. (2d) 120, 124-125, C. A. 6th. The Labor Management Relations Act in defining the phrase "to bargain collectively" expressly provides * * * "but such obligation does not compel either party to agree to a proposal or require the making of a concession." Sec. 158(d), Title 29, U. S. Code. It would seem to logically follow that the common law right on the part of the employer to select his employees and to terminate their employment at will continues to exist except to the extent that it may be modified by the bargaining contract with the Union. Instead of making this right dependent upon a provision to that effect in the contract, it is a right which an employer normally has unless it has been eliminated or modified by the contract. Accordingly, we are not in agreement with what we construe to be the District Judge's conclusion of law that since there was no provision in the collective bargaining contract authorizing the termination of appellee's employment by reason of age, such right did not exist.

The District Judge reached that conclusion upon the theory that the bargaining agreement expressed the complete obligations and rights of the parties relating to employees, including conditions and tenure of employment, which in turn included termination of employment, and that the employer should not be permitted to withhold an undisclosed employment right not recorded or reserved by the agreement. Although it may be the theory of the law that collective bargaining may at times or eventually accomplish that result, the express language of the Labor-

Management Relations Act (Sec. 158[d], Title 29, U. S. Code) and the authorities above referred to make it clear that a collective bargaining agreement does not necessarily express the full coverage of employment rights. It covers such matters only as the parties may have been able to agree upon and leaves unresolved such issues as the parties may not have been able to agree upon and with respect to which the law does not require a concession by either party. As hereinafter pointed out, the evidence in this case shows that compulsory retirement was one of the issues between the Company and the Union upon which no agreement could be reached. Involving such factors as age of retirement, rights thereafter based on length of service, and the adequacy and financing of a pension plan to be linked with compulsory retirement, it was a matter of importance to both the Company and the Union furnishing a large area for discussion and negotiation. A failure to reach an agreement on this subject would not prevent the execution of a collective bargaining agreement covering most of the standard issues usually included in such agreements. *N. L. R. B. v. Nash-Finch Co.*, 211 F. (2d) 622, 626-627, C. A. 8th. The Union was within its rights in refusing to agree to a compulsory retirement policy, which the evidence shows was presented by the Company in collective bargaining sessions, without it being linked to an adequate and satisfactory pension plan. But such failure to reach an agreement did not deprive the Company of its common law right to hire and fire at will until such an agreement was reached. *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, 402. Accordingly, instead of searching for a provision in the contract authorizing termination of employment by reason of age, we think it is necessary to determine from a consideration of the terms of the contract whether termination of employment by reason of age was prohibited by the contract. *N. L. R. B. v. Nash-Finch Co., supra.* This requires the application of the usual rules involved in the construction of a written instrument.

Appellee throughout his argument contends that the contract provides that employment could be terminated

only for proper cause and that reaching the age of 65 is not proper cause. If the contract so provided, that might well be the end of this case. But we do not find such a provision in the contract. The contract deals with "discharge for proper cause," not "termination of employment" for proper cause. Unless the word "discharge" is considered to be the same as "termination of employment" or compulsory retirement, the contention has no merit. Such a construction, however, was expressly rejected by the District Judge, who said in his opinion: "I think there is no question that the word 'discharge' has a different meaning than 'compulsory retirement' and I do not hold that the plaintiff was discharged in the usual and ordinary sense of that term." We think this conclusion necessarily follows from a consideration of the express terms of the contract.

The contract plainly recognizes the fact that "discharge" is something different from "termination of employment." For example, Sec. 7(F), dealing with vacations, provides—"No employee shall be eligible to receive any benefits under this Section if he *resigns* from the employment of the Company *or* if he is *discharged.*" (Emphasis added.) Sec. 8, dealing with Seniority, provides: "Probationary employees may be *laid off* or *discharged* as exclusively determined by Management, provided that this provision will not be used for purposes of discrimination because of membership in the Union." (Emphasis added.)

The distinction is also clearly expressed in Section 10 dealing with rights of Management. Section 10 reads as follows: "The Management of the works and the direction of the working forces, including the right to hire, suspend or *discharge* for proper cause, or transfer, and the right to *relieve employees from duty* because of lack of work *or for other legitimate reasons,* is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union." (Emphasis added.) This provides for the termination of employment in two different ways: (1) Discharge for proper cause, and (2) the right to relieve employees from duty be-

cause of lack of work or for other legitimate reasons. Obviously, the Company was not restricted in its right to terminate employment to a situation involving "discharge for proper cause."

The conduct of the parties over a period of years clearly shows that Section 10 was not intended by the parties to cover the question of compulsory retirement for age. Each of the collective bargaining contracts of March 17, 1937, April 1, 1941, and September 1, 1942, contained a section dealing with rights of Management in identical language to that used in Section 10 of the contract now under consideration. While those contracts were in force the Company continued to enforce its retirement policy originally initiated in 1931. In June, 1938, grievances were filed by employees Svitkovich and Muffly by reason of their having been laid off because they were over 65. They were not pressed to a conclusion. During 1941 and 1942, Union representatives meeting with representatives of management unsuccessfully protested the enforcement of the rule by the Company. During 1942, grievances of employees Kordelshi, Byrer and Hermann, based on retirement for age, were disposed of favorably to the Company's policy. In several meetings in 1943 the Company defended and maintained its position. In the negotiations leading up to the 1942, 1945 and 1947 contracts the subject of compulsory retirement was one of the issues which the Company tried to have expressly covered by the contract, but upon which the Company and the Union were unable to reach an agreement. No contention was made that such an issue was already covered by the existing section dealing with rights of management. Although appellee's evidence was to the effect that the Union never acquiesced in the Company's policy, the evidence also shows without question that over a period of years prior to the March 13, 1945 contract such a policy was actually in force and effect and was never successfully challenged by the Union.

The construction which the parties themselves gave to the 1945 contract strongly supports the conclusion that

the contract did not cover the question of retirement for age. In August, 1945, after it became effective, 245 employees, who during the war years had been rehired after having been retired, were again retired. Between that time and October 1, 1946, 143 additional employees were retired because they were over 65 years of age. Only one grievance was filed by said 388 employees so retired. Although appellee was retired on May 31, 1946, he filed no grievance, and did not institute this action until more than four years later.

At the Constitutional Convention of the United Steel Workers of America, held in 1948, to which the Local Union sent its President as a delegate, the Company's compulsory retirement program was brought up as a subject of discussion on the floor of the convention, with particular reference to the inadequate pension system in effect for those so retired. The Union took the position that steps should be taken by the process of collective bargaining available to the Union to correct the situation. President Phillip Murray urged upon the delegates to make it their business "at the expiration of your wage agreement—and in your next negotiations also * * * to protect the interests of the aged, the decrepit, and the sick and the lame." The conclusion seems inescapable that while the Company and the Union were never in agreement about the Company's policy of compulsory retirement, the Union nevertheless recognized that it was not covered by the 1945 contract and was a matter to be included in the collective bargaining negotiations in the future. *Williams v. Jacksonville Terminal Co., supra,* 315 U. S. 386, 401.

Against such a background of custom, protests and negotiations it can not be said that the issue of compulsory retirement was inadvertently overlooked in executing the March 13, 1945 contract, or, as we construe the ruling of the District Judge, that the failure to specifically cover the issue in the 1945 contract should be construed as an implied agreement by the Company to abandon the policy. *N. L. R. B. v. Nash-Finch Co., supra,* 211 F. (2d) 622, 626-627, C. A. 8th.

Nor can we concur in the analysis of the contract by the District Judge that unless so construed it would enable the Company to withhold from the employees some undisclosed rights in respect of employment which the contract was intended to cover. The foregoing background completely negatives the contention that the Company's compulsory retirement policy was undisclosed to the Union. We believe it is immaterial whether individual employees knew of the policy. The Union was their authorized bargaining agent and executed the contract on their behalf. Whatever rights the appellee has to protect him against discharge at will are derived from the contract. If he seeks rights under the contract he must also accept its obligations. His present action is based upon the contract. His amended complaint alleges that his discharge constituted a breach of the contract of May 13, 1945. In seeking a recovery under the contract, he is bound by the terms of the contract, whether they were expressly authorized by him at the time of its execution or not. Restatement, Agency, Sec. 96, 97; *Clews v. Jamieson*, 182 U. S. 461, 483.

The District Judge ruled that the appellee was not "discharged in the usual and ordinary sense of that term." However, he gave judgment for the appellee upon the ground that appellee's "employment was effectively and forcibly terminated" in breach of his contract rights, holding that the legal and practical effect of compulsory retirement was the same as a discharge. It is true, as pointed out by the District Judge, that the end result of discharge and compulsory retirement was the same, namely, termination of employment. But, in dealing with rights and obligations under a written instrument we cannot ignore distinctions expressly made by the wording of the instrument merely because the end result is the same. For example, a man may be killed in an automobile accident or may die from natural causes. Although the result is death in either case, the exact manner of meeting death is controlling in determining whether there is any recovery under an accident insurance policy. So, in the present case, it is not decisive that appellee's employment was

terminated. Appellee has a cause of action under the written contract only if his employment was terminated by a discharge without cause.

The Company would not be justified in "discharging" an employee under a so-called retirement policy if the alleged retirement policy was actually non-existent, or was discriminatorily enforced in order to effect what was actually a discharge under the guise of retirement, or was in substance merely a subterfuge to avoid its contractural obligation against discharge. *United Protective Workers of America v. Ford Motor Co.*, 194 F. (2d) 997, 1003, C. A. 7th. The retirement policy in the present case did not include any of those vitiating factors. The District Judge found as a fact that the policy of compulsory retirement at 65 was adopted in 1941. He did not find its provisions to be unreasonable. It was not enforced in a discriminatory manner. The Union officials knew about the policy and its enforcement at the time of the execution of the contract. Since the contract did not prohibit its continued enforcement, we find no breach of appellee's contractual rights in enforcing the policy as to him.

There seem to be very few reported decisions involving the exact issue in this case. The ruling in *N. L. R. B. v. Nash-Finch Co., supra*, 211 F. (2d) 622, C. A. 8th, appears to be in accord with the ruling in this case. On the other hand, appellee relies strongly upon *United Protective Workers of America v. Ford Motor Co., supra*, 194 F. (2d) 997, reported on second appeal at 223 F. (2d) 49, C. A. 7th. Some general language in the first opinion of the Court of Appeals (p. 1003) supports appellee's position. However, on that appeal the Court had before it only the allegations of the complaint to which no answer or other responsive pleading had been filed. The Court ruled, and we believe properly so, that the allegations of the complaint that the Ford Company did "dismiss from its services and terminate the employment of" the plaintiff in violation and breach of the collective bargaining agreement, stated a cause of action. It pointed out that while the District Court dismissed the complaint on the theory

that the Ford Company retired the plaintiff "pursuant to an established plan or policy," there was no pleading revealing such plan. The case was sent back to the District Court to afford the defendant an opportunity to answer the complaint. Following the filing of an answer and a trial in the District Court, the District Judge, in an unreported opinion, ruled that the Ford Company had "not demonstrated that it designed and employed any uniform retirement plan which might have justified" the plaintiff's dismissal, and gave judgment for the plaintiff. This ruling was affirmed on the second appeal. We construe the two opinions together as holding that in the absence of an established, bona fide, uniform retirement plan, the Company could not "discharge" an employee without cause "by the simple expedient of saying that the employee had been retired, and in that manner avoid the consequences of breaching a contract which prohibits discharge except for cause." 194 Fed. (2d) at p. 1003. We have hereinabove indicated our agreement with such a ruling. The present case presents a materially different situation, in that appellee's retirement was in accordance with a well established, bona fide retirement plan, which was found by the District Judge to have been in operation for a number of years prior to the retirement of appellee.

Our ruling on this phase of the case renders unnecessary a consideration of appellant's other contentions. The judgment is reversed and the case remanded to the District Court for further proceedings consistent with the views expressed herein.

MARTIN, Circuit Judge, dissenting. I would affirm the judgment of Chief Judge Paul Jones of the Northern District of Ohio upon the basis of the reasoning in his opinion, published in 122 F. Supp. 726, under the title, *Nichols v. National Tube Company.*

APPENDIX D.

OPINION OF THE DISTRICT COURT.

(May 13, 1954.)

JONES, J.:

The plaintiff Nichols was in the employ of the defendant Company for approximately twenty-seven years,—the last twenty-five years of that time continuously, in its coke plant at Lorain, Ohio. He was a member of the Local Chapter of a National or International Union having a collective bargaining contract with the defendant, executed March 13, 1945, extending to April 22, 1947.

On May 17, 1946, he was called from his work to the Company office and told for the first time that his employment with the Company would be terminated as of May 31, 1946, for the sole reason that he had attained the age of 65 years and because of the Company's policy of compulsory retirement of its employees at that age. He seeks damages upon the claim that he was wrongfully discharged in violation of his rights under the labor contract in effect at the time and without any cause or reason such as required for discharge or termination of employment by the conditions of the bargaining agreement.

Stripped of its many seeming technical issues, I think the case comes down to the single question of what rights the plaintiff had as an employee of the defendant under the collective bargaining agreement of 1945 in effect at the time of his compulsory retirement as of May 31, 1946.

The defendant sets up numerous grounds for denial of any rights claimed by him and several affirmative contentions why it has no responsibility to the plaintiff.

It is conceded that plaintiff's employment was terminated by the defendant upon the sole ground that he had reached the age of 65 years, and the defendant asserts it had the right to do so despite the labor agreement because it had, some years earlier, adopted and put into uniform practice a policy of retiring all of its employees at the age of 65 years, regardless of their physical fitness to continue with the work they were doing at the time. Although this

right or policy was not incorporated or reserved in the labor contract, the defendant relies upon its claimed right of retention of its compulsory retirement policy and, if not, it relies upon the Labor Union representative's knowledge of and acquiescence in the policy and that the plaintiff is charged with knowledge of the policy, or bound by the acquiescence of the Union representatives, because he was a member of the Local and also, as well, that he must have had knowledge of it from what was happening to other employees over the years.

During the trial the parties entered a stipulation to try the case without a jury.

One ground of defendant's motion for directed verdict or for judgment is that even if plaintiff did not know about the policy, he failed to institute grievance proceedings provided by the contract and therefore having failed to exhaust the contract's procedural and administrative remedies is not entitled to maintain this action.

There are many other matters recited in the answer as defenses, some relating to plaintiff's claim of loss of pension and other benefits by reason of what he terms his wrongful discharge. The plaintiff does not seem to have been one of those qualified for pension. The Company, as such, did not have a pension plan but under certain conditions an employee might become eligible for a small pension under a plan founded by Carnegie and the United States Steel Corporation, but in cases where Social Security exceeded the pension payments no pension was available.

Evidence was received to the effect that the Company at Lorain had entertained many grievance proceedings, initiated by or for other employees who had been retired at the age of 65 years. As it seems to me, such evidence must be limited to the issue of the adoption and enforcement of the compulsory retirement policy. It cannot, consistently with reason, be extended to establish the necessity or requirement of instituting the grievance proceedings provided by the contract since the right of compulsory retirement was not mentioned or reserved in the contract;

and the defendant has asserted that it had retained that right despite the absence of anything regarding it in the labor agreement. To me it would seem not only inconsistent with the defendant's position, but completely futile to have instituted grievance proceedings in such circumstances. The retired employee had not the slightest chance of remedial consideration; there was no basis for relief. According to the defendant, the policy of retirement was inflexible and no one in the Company had the right to make exceptions; it was not an arbitral grievance; consequently, it would not be expected that the plaintiff should be required to do a vain thing as a prerequisite to a suit. I do not read the decision in Timken Roller Bearing Co. v. National Labor Relations Board, 161 F. 2d 949, as requiring the use of the grievance procedure in situations or disputes where, as here, the Company had taken the inflexible position that compulsory retirement was not the subject of arbitration.

The contention of defendant that the agreement of March 1, 1950 between the United Steelworkers of America and the defendant constitutes full and complete settlement and disposition of the claim asserted by plaintiff in this action is untenable.

While it may be conceded that the Union as collective agent might enter into an agreement settling for the future the subject of retirement and pensions, Elgin, Joliet & Eastern Ry. Co. v. Burley, et al., 325 U. S. 711 (1945), rehearing 327 U. S. 661 (1946); Inland Steel Co. v. National Labor Relations Board, 7 Cir., 170 F. 2d 247 (1948); Lewellyn v. Fleming, 10 Cir. 154 F. 2d 211 (1946), it could not settle and dispose of plaintiff's accrued rights retroactively, unless authorized in some legally sufficient way to act in his behalf. Elgin, Joliet & Eastern Ry. Co. v. Burley, et al., supra; Kordewick, et al., v. Brotherhood of Railroad Trainmen, et al., 7 Cir. 181 F. 2d 963 (1950).

The evidence does not disclose a legally sufficient agency. There is no evidence that plaintiff gave specific authorization to the Union to act in his behalf. Indeed, at the time the Union purported to settle his claim he was

no longer an active member. It is fair to say that the Union to some extent was bartering away claims of former members in an attempt to secure present benefits for active members. Even though in so doing the Union was properly representing its membership, the conflict of interest dispels a true agency so far as the plaintiff is concerned. Edwards v. Capital Airlines, D. C. Cir. 176 F. 2d 755 (1949).

Nor is the insertion of Article XVII in the constitution of the United Steelworkers of America on May 18, 1946, a sufficient authorization in this instance. It would be ignoring realities to hold that the plaintiff—who already had been notified of his retirement on May 17, 1946, and whose employment was finally terminated on May 31, 1946—impliedly accepted Union authority created by an amendment to its constitution and not to be exercised until years later when he was no longer an active member. Substantial rights can not be disposed of by such technical niceties.

It does not seem to me that the decision of the Supreme Court in the Burley case, supra, is sufficient authority to sustain the Resolution of the Union Convention so as to wipe out the accrued rights of employees by subsequent action. It is fundamental that such action may not have retroactive effect to impair or destroy accrued or pre-existing rights. The fact that the National Union adopted such Resolutions as the one of May, 1946, is strong support for the plaintiff's position that the Union had no such power or authority over the plaintiff's accrued rights under the 1945 contract. I cannot interpret the decision in the Burley case as suggesting or proposing retroactive impairment or curtailment of a Union member's pre-existing contract rights by subsequent constitutional Resolution depriving members of their accrued rights, nor can I find sound reason for finding that the 1946 proceedings of the National Union should be applied to rights long since arising and belonging to the plaintiff.

It is well understood that the Union constituted the bargaining agent of the Union members and as such nego-

tiated the contract which became binding on the members, but I am not prepared to hold that the Union as agent may be permitted to barter away the Union member's rights acquired under the contract by tacitly acquiescing in a Company policy of which the Union member had neither notice nor knowledge.

Thus the disposition of the twenty-six or more grievances, based upon compulsory retirement, held in abeyance in what has been called "step four" of grievance procedure and later, on March 1, 1950, made the subject of a settlement agreement between the Company and the Union could not destroy rights secured to the plaintiff by the 1945 contract. In the later agreement, while settling the claims, the Company adroitly, but, as I think inconsistently, reasserted its position that grievances based upon compulsory retirement were not the subject of arbitration.

I hold that the agreement of March 1, 1950 is not a bar to the assertion by plaintiff of his present claim.

I had supposed, until now, that a bargaining agreement expressed the complete obligations and rights of the parties relating to employees, including conditions and tenure of employment, and conditions respecting means for termination of employment; but here it is pressed upon me that any method of terminating employment, such as compulsory retirement, not expressed in the agreement is retained by, or reserved to the Company, and this without notice to or knowledge of the employee, who is, on the contrary, charged with implied knowledge of the reservation. This is, as Professor Lehosky testified, the theory of collective bargaining and the interpretation adopted in arbitration of labor disputes. The defendant's claim that this was the interpretation accepted and acquiesced in by Union leaders and responsible Union representatives again seems to me to be inconsistent with the testimony and evidence of Mr. Hobby in the examples submitted of grievance procedures based upon compulsory retirement. In such cases, the Union representatives uniformly supported the employee's claims to relief.

The nearest authoritative judicial approach to this question may be found in Timken Roller Bearing Co. v. National Labor Relations Board, supra, where Judge Simons, speaking for the court, stated that the matter of sub-contracting was viewed by the Company as of no concern to the Union because the Company had regarded sub-contracting as its exclusive prerogative. He found, from the record, without controversy, that the Company and the Union construed the management clause as including sub-contracting as a management function. But, unlike the Timken case, the defendant here did not contend that compulsory retirement was a management prerogative, reserved under the management clause of the contract. Here the matter of employment conditions, tenure and termination were the chief objects of agreement and the subjects of prime interest and importance to the Union and to the employees. The defendant took the position that the question of compulsory retirement could not be the basis of an arbitral grievance and that any dispute about it was not subject to arbitration.

What should a collectively bargained labor contract cover, unless the complete agreement upon conditions, tenure, and termination of employment? What other object and purpose can there be for such an agreement? If some undisclosed rights in respect of employment are not included or, without notice to the employees, are withheld on the theory that they are not the subject of bargaining, how can the contract be said to express the full coverage of employment rights?

A current decision by the Eighth Circuit Court of Appeals, National Labor Relations Board v. Nash-Finch Company, 33 L. R. R. M. 2898 (not yet officially reported), has been brought to my attention, wherein the court held against the National Labor Relation Board's attempt to hold the company to certain standards of wages and working conditions not provided in the bargaining agreement; and this on the theory, as defendant here claims, that matters not expressed in the agreement are retained by the employer.

But in our case, tenure and termination of employment were among the most important objects, purposes and provisions of the bargaining agreement. If management desired and intended to retain a compulsory retirement practice, it should have reserved that method of termination of employment in the contract, or notified its employees of its purpose and intention in respect of such policy.

What well might be called an industrial revolution brought about the collective bargaining procedure,—industry and the workers were to meet upon a contractual basis of rights and obligations; each controlled and restrained within the terms of the bargain. It is not to be supposed that the employees were to retain some undisclosed rights which they could thereafter continue to assert without consent or consideration of the employer. No more do I think may the employer withhold an employment right not recorded or reserved by the agreement. These contracts are somewhat of the nature of the Book of the Common Law of ancient days upon which employers and the artisans pledged their mutual understanding and future conduct toward each other's rights.

If that defense should be sustained, the matter of notice of or acquiescence in a practiced policy of compulsory retirement is of no consequence.

If the foregoing is the right answer I think all the proffered evidence of the defendant as to prior and subsequent successive labor contracts containing no restriction upon or mention of the alleged compulsory retirement policy of the Company, and the proffered evidence tending to show the understanding, knowledge and acquiescence of Union leaders or representatives in the retention or reservation of the retirement policy of the Company have limited relevancy; if, indeed, such evidence is relevant at all it must be related to two things which I think would have to be established to make such defense effective: (1) that the knowledge of the Company's retirement policy was brought to the attention of the plaintiff,—through the Company officials or its responsible employees,

or through the responsible representatives of the Union Local; (2) that having such knowledge, plaintiff be said to have acquiesced in such policy by continuing as a member of the Union with knowledge that there was nothing in the labor contract protecting him against the right of the Company to enforce its retirement policy.

While there is evidence that the defendant had a somewhat flexible retirement policy from 1931 to 1941, the policy of compulsory retirement at 65 was adopted in 1941. However, it appears to have been suspended, or modified, during the war emergency. Thus, it will be seen that for four or more years of the existence of the alleged inflexible compulsory retirement policy the evidence is that the Company had modified the policy to the extent of rehiring, stripped of rights, employees who had been shortly theretofore retired at 65. If plaintiff was supposed to have had some knowledge or implied understanding of a fixed retirement policy he could not, as it seems to me, be expected to understand that the Company had only temporarily, for the duration of the war emergency, departed from its compulsory retirement policy.

There is no evidence that any responsible or authoritative representative of the Company or of the Union ever notified the plaintiff of such policy before the abrupt termination of his employment and notice on May 17, 1946.

Nor is there any evidence sufficient, or of probative effect, to charge the plaintiff with knowledge of the existence of the policy, or any evidence to support an understanding of and acquiescence in any such policy.

The plaintiff, as a member of the Union, was bound by the terms and provisions of the bargaining agreement, but surely he could not, in law and justice, be bound by the interpretations and tacit understanding or acquiescence of Union leaders or representatives which were not brought to his knowledge or understanding.

Negotiations by the Company and the Union leading up to the bargaining agreement and the execution of a subsequent contract making some provision for pensions or retirement income cannot, as it seems to me, affect or

determine rights belonging to the plaintiff under the 1945 contract.

I cannot construe the existence and practice of a compulsory retirement policy as placing the burden of finding out about the practice upon the employee, nor can I subscribe to the theory that absence of a compulsory retirement provision from the contract leaves the arbitrary power in the Company to enforce retirement without notice or knowledge upon the part of the employee who is a party to the contract and without regard to the rights belonging to him under the provisions of the contract.

Although MacDonald, a high Union official, in his deposition was somewhat evasive on cross-examination, his statement of the Union's position that the contract did not justify the retention by the Company of a right to compulsory retirement, corroborates the position taken by plaintiff's witness Schremp who had worked for the defendant twenty-eight years and also was a member of the Union Grievance Committee during the years involved in this proceeding, and, as I think, more likely reflects the real position of the Union than that testified to in deposition by defense witness Stevens in his notes as to what Philip Murray told him; and Murray's statement in the 1946 Convention came after the event and could not, in my view, be controlling as to the plaintiff's rights—by this I mean the plaintiff's rights under the 1945 contract and not his right to bring suit.

To be realistic and practical in determining the rights of the plaintiff it seems to me that the defendant, to insure the preservation of its policy, had one, or possibly two responsibilities: (1) expressly, through responsible authority to advise the plaintiff at the inception of such policy and of its adoption, or (2) to have made such a reservation in the bargaining agreement, in which event the plaintiff would have had doubtful rights of redress. Legal reason and justice seem to me to require that in the absence of effective affirmative evidence of knowledge of the existence of the retirement policy and express or implied understanding that the labor agreement did not pro-

tect him against the compulsory policy, the plaintiff had a right to rely upon the termination of his employment being dependent upon the express provisions of the labor agreement. I think it not enough that the labor leaders or representatives knew and acquiesced. The plaintiff could not be bound by some implied understanding or acquiescence not brought home to him by responsible authority.

As it seems to me, bargaining agreements, to be binding upon Company and employees, should expressly define their respective obligations as well as the limits on or extent of the employee's rights.

I think there is no question that the word "discharge" has a different meaning than "compulsory retirement" and I do not hold that the plaintiff was discharged in the usual and ordinary sense of that term. But his employment was effectively and forcibly terminated without any cause expressed or contemplated by the labor agreement, and in breach of his rights.

The legal and practical effect of compulsory retirement is the same as a discharge and therefore, as it seems to me, there was no contractual ground upon which to base the forcible termination of the plaintiff's contract. The plaintiff cannot thus be deprived of his right to rely upon the contract as providing the only means by which his employment could be terminated. Inland Steel Company v. National Labor Relations Board, supra; United Protective Workers of America v. Ford Motor Co., 194 F. 2d 997; International Association of Machinists v. General Electric, 24 L. R. R. M. 2527 (Cuyahoga County Common Pleas).

What has been said before respecting the creation of an agency in the Union, disposes of defendant's contentions that the action is maintainable only by the collective bargaining agent and that the collective bargaining agent is a necessary party to this action. This is not a matter affecting the collective interest, in which the collective agent would have an interest.

Consideration for the agreement of the Company is found in the forbearance of all workers in agreeing not to exercise certain rights. With respect to the plaintiff as an

individual, the contract is unilateral. The Company agreed that its offer of employment could be withdrawn only in the circumstances stated in the collective bargaining agreement.

At the time of the termination of plaintiff's employment he was 65 years of age and, according to the evidence, in good health and able to do the work required of his job, with a life expectancy of eleven-plus years; he now is 73 years of age, claims still to be in good health and able to do the work required of the same job, with a present life expectancy of approximately seven years. The only employment he has been able to secure for the most part has been janitor work but he has not been able to secure anything as substantially gainful as the work he was doing upon his retirement. The only evidence upon the subject of damages is found in the stipulation of what amounts he has been able to earn since his retirement, and the earnings of the employee who took over his job. Unless we accept this as the reasonably certain measure of his damage it is difficult to know by what other means to determine the question. One will have to assume that under normal conditions he would have continued to work under the subsequent like contracts and on the same job that his successor obtained and held over that period, and probably entitled to recover for loss of pension rights under the 1950 contract, although somewhat speculative. On the whole, I think damages reasonably certain to have been sustained, fairly and justly appraised at present value, would be $25,000.00, including loss of earnings and pension rights.

Enough has been said in this memorandum to make it adequate compliance with and sufficient as to findings and conclusions under Rule 52(a).

In view of the decision reached, the motion of the defendant, at the conclusion of the evidence, to dismiss and for judgment, will be denied.

JONES,

United States District Judge.

May 13th, 1954.

APPENDIX E.

OPINION ON MOTION TO AMEND FINDINGS AND FOR ADDITIONAL FINDINGS.

(June 15, 1954.)

JONES, *J.*:

Defendant asks the court to amend findings made herein, and to make additional findings.

The separate requests will be considered in order:

Defendant's request 1(a):

The "finding" to which defendant objects is a fair statement of defendant's position at the time of trial. While defendant did specifically plead the provisions of the management clause in its tenth defense, it did not during the trial and in argument seriously press this defense.

Throughout the trial defendant contended that its right to retire employees was a retained right, independent of the bargaining agreement and not inhibited or surrendered by the agreement. This is shown by its statement of propositions relied upon in its trial memorandum, and further by its failure to include its tenth defense in its motion to dismiss at the close of the trial.

In any event, by the clearest principles of contract interpretation the general provisions of the management clause could not prevail over specific provisions in the contract relating to tenure of employment. This is true especially in the present case since there was no effective or satisfactory evidence that the Union and aggrieved employee had agreed to, or acquiesced in, the Company's retirement policy as a management prerogative, or that the parties had so interpreted the agreement by their conduct.

Defendant's first request will be denied.

Defendant's request 1(b):

The language objected to is not significant. It may be amended to read "three years."

Defendant's request 1(c):

The retirement policy from 1931 to 1941 was "somewhat flexible." Request denied.

Defendant's request 1(d):

The date will be amended to read "Murray's statement in the 1948 Convention," as defendant requests.

Defendant's request 1(e):

The finding to which defendant objects is fully supported by the evidence. Request denied.

Defendant's request for additional findings:

The memorandum opinion of the court, as it seems to me, includes findings sufficient to make clear the basis for decision. There are findings of the important and controlling facts necessary to decision. The court is not required to make findings as to every evidentiary fact. Accordingly, the request for additional findings will be denied.

JONES,

United States District Judge.

June 15, 1954.

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FILED
MAY 9 1958
HAROLD B. WILLEY, C

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 842

SIM L. NICHOLS,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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In the Supreme Court of the United States

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SIM L. NICHOLS,

Petitioner,

vs.

UNITED STATES STEEL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

This case involves a suit by the petitioner for alleged breach of contract by the respondent. The only question decided by the Court of Appeals was the question of how the *particular contract involved* should be construed *under the particular facts* disclosed by the evidence *in this case.*

The construction of the contract by the Court of Appeals against petitioner's claim of breach does *not* involve any question of federal law, is *not* in conflict with any decision of any other Court of Appeals or with any decision of this Court, and does *not* fail to follow any applicable Ohio decision or law.

COUNTER STATEMENT OF THE QUESTION PRESENTED.

The *only* question presented is whether the Court of Appeals, in a case in which jurisdiction rests on diversity of citizenship, while applying ordinary common law rules of contract construction to the evidence in this particular case, properly construed the contract, breach of which the petitioner asserted.

STATEMENT OF THE CASE.

Nichols, the petitioner, had been an employee of National Tube Company[1] since 1918. From 1931 until 1949 the Company had enforced non-discriminatory compulsory retirement of all of its employees, at an attained age, which after January 1, 1941, was 65. In May, 1946, petitioner, upon reaching age 65, was retired by the Company in accordance with its compulsory retirement plan.

Beginning in 1937, petitioner was one of the Company's employees represented in collective bargaining by the United Steelworkers of America. In 1937, 1941, 1942 and 1945 the Union negotiated and entered into labor contracts with the Company, covering the terms and conditions of employment of petitioner and others of the Company's employees represented by the Union. Each of these contracts contained prohibitions against *discharge* of its employees by the Company except for cause. *None* of the contracts, however, contained any reference to *retirement*, despite the fact that during the entire period covered by the contracts the Company had continuously maintained and enforced its plan of compulsory retirement with the full knowledge of the Union.

At the time of Nichols' retirement on May 31, 1946, the labor contract of 1945, dated March 13 of that year, was in force and effect. In July, 1950, more than four years after his retirement, Nichols brought this action, alleging that "contrary to the terms and provisions of said contract of March 13, 1945, and on May 17, 1946, the defendant did peremptorily and without first suspending the plaintiff, and without proper cause or legitimate rea-

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[1] After this action was commenced National Tube Company was merged into United States Steel Corporation, which was substituted as party defendant.

son therefor, discharge the plaintiff, effective May 31, 1946." (Amended Complaint, Par. 6; R. 7a.)

The Company denied petitioner's claim. It defended on the ground that petitioner had been retired, not discharged; that petitioner's retirement was in accord with the Company's long established policy of compulsory retirement which had been uniformly enforced without discrimination; that the 1945 contract did not prohibit such retirement; and that the Company therefore had not breached the contract.

THE OPINIONS OF THE COURTS BELOW.

Both the District Court, which tried the case without a jury, and the Court of Appeals, agreed that the case involves simply a question of contract interpretation and construction.

The District Court's analysis was:

> "Stripped of its many seeming technical issues, I think the case comes down to the single question of what rights the plaintiff had as an employee of the defendant under the collective bargaining agreement of 1945 in effect at the time of his compulsory retirement as of May 31, 1946." (Pet. p. 39.)

The Court of Appeals, in turn, put the question:

> "Accordingly * * * we think it is necessary to determine from a consideration of the terms of the contract whether termination of employment by reason of age was prohibited by the contract. * * * *This requires the application of the usual rules involved in the construction of a written instrument.*" (Pet. p. 32.) (Emphasis supplied.)

In their approach to the proper construction of the contract, both courts below were bound by the following legal principles, long well settled in the law of Ohio:

> "The meaning of this instrument should be determined by following the usual and well established rules of construction. The purpose of construction is primarily to determine the intent of the parties." *O'Neill v. German,* 154 Ohio State 565, 570;
>
> "* * * the surrounding circumstances may be proven, not to contradict or vary the terms of the writing but, to enable the court to put itself in the place of the parties the better to understand the terms employed in the writing and to arrive at the mutual intention of the parties." Syllabus in *Merchants National Bank v. Cole,* 83 Ohio State 50;[2]

and

> "while much regard will be given to the clear intention of the parties, yet where the contract is entirely silent as to a particular matter, the courts will exercise great caution not to include in the contract, by construction, something which was intended to be excluded." Syllabus in *East Ohio Gas Company v. The City of Akron,* 81 Ohio State 33.

Here petitioner claimed to have been wrongfully *discharged* in violation of the contract. Neither court below agreed with this claim, the District Court finding:

> "I think there is no question that the word 'discharge' has a different meaning than 'compulsory retirement' and I do not hold that the plaintiff was discharged in the usual and ordinary sense of that term." (Pet. p. 48.)

The District Court, however, read into the contract, by implication, what the Court of Appeals described "as an implied agreement by the Company to abandon the policy" of retirement. (Pet. p. 35). The District Court's

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[2] In Ohio the syllabus is prepared by the members of the Court concurring in the judgment and contains the law of the case, *State, ex rel. Donahey v. Edmondson,* 89 Ohio St. 93, 107, 108.

own words were that "* * * there was no contractual ground upon which to base the forcible termination of the plaintiff's contract. The plaintiff cannot thus be deprived of his right to rely upon the contract as providing the only means by which his employment could be terminated." (Pet. p. 48.)

The District Court disregarded settled Ohio law not only in engrafting this implied provision upon the contract by judicial construction, but also in ignoring or refusing to consider the negotiations, practices, prior contracts, and mutual interpretations thereof and relations thereunder, of the Company and the Union, and other evidence of the background in which they negotiated and agreed upon the contract in suit,[3] merely because petitioner, himself, was not familiar with all of them.

The Court of Appeals disagreed with this approach. As it was bound by Ohio law to do, it reviewed in detail the provisions of the contract and the extensive record disclosing the negotiations, practices, background and conduct of the parties under that contract and similar predecessor contracts, and the Company's concurrent uniform and non-discriminatory enforcement of its established retirement policy throughout the terms of all of said contracts.

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[3] "* * * the matter of notice of or acquiescence in a practiced policy of compulsory retirement is of no consequence. * * * I think all the proffered evidence * * * as to prior and subsequent successive labor contracts containing no restriction upon or mention of the alleged compulsory retirement policy of the Company, and the proffered evidence tending to show the understanding, knowledge and acquiescence of Union leaders or representatives in the retention or reservation of the retirement policy of the Company have limited relevancy; if, indeed, such evidence is relevant at all * * *," etc. (Opinion of District Court, Pet. p. 45.)

After such a review it was forced to conclude that:

> "Against such a background of custom, protests and negotiations it can not be said that the issue of compulsory retirement was inadvertently overlooked in executing the March 13, 1945 contract, or, as we construe the ruling of the District Judge, that the failure to specifically cover the issue in the 1945 contract should be construed as an implied agreement by the Company to abandon the policy." (Pet. p. 35.)

and that:

> "The construction which the parties themselves gave to the 1945 contract strongly supports the conclusion that the contract did not cover the question of retirement for age." (Pet. pp. 34, 35.)

Accordingly, the Court of Appeals, after "application of the usual rules involved in the construction of a written instrument" (Pet. p. 32) concluded that "we find no breach of appellee's contractual rights in enforcing the policy [of compulsory retirement] as to him." (Pet. p. 37.)

ARGUMENT.

In essence, the petition seeks to have this Court probe the entire record, appraise the contract, and determine whether or not the Court of Appeals properly construed the ordinary labor contract here involved.

In an attempt to obtain such a review, petitioner alleges a conflict of decisions. But no amount of ingenious advocacy can obscure the fact that petitioner's position amounts to no more than a claim that the meaning and effect given by the Court of Appeals below to the 1945 labor contract between the National Tube Company and United Steelworkers differs from the meaning and effect given to:

1. A different contract between the Ford Motor Company and the United Protective Workers as that

contract was interpreted in the light of *different* evidence by the Court of Appeals for the Seventh Circuit in *United Protective Workers v. Ford Motor Company*, 194 F. 2d 997 and 223 F. 2d 49.

2. A still *different* contract between the General Electric Company and the Machinists' Union as that contract was interpreted by an Ohio state nisi prius court in the light of still *different* evidence in *International Association of Machinists v. General Electric Company*, 72 Ohio Law Abstract 257.[1]

3. The *different* provisions of a municipal ordinance conflicting with the further *different* provisions of an Ohio state statute dealing with the tenure to be enjoyed by city policemen and firemen as construed by the Supreme Court of Ohio in *State v. Toledo*, 142 Ohio State 123.

Mere *differences* in result among cases arising under *different* facts and different laws fall far short of the *conflict* of decisions contemplated by the rules of this Court.

A. The decision below does not conflict, but is consistent with the decision of the Court of Appeals for the Seventh Circuit in the Ford Motor case.

In *United Protective Workers v. Ford Motor Co.*, 194 F. 2d 997 and 223 F. 2d 49, the plaintiff employee claimed that his alleged compulsory retirement by Ford violated a labor contract between Ford and the United Protective Workers Union. After a second appeal to the Court of

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[1] First reported in the advance sheets of the privately published Ohio Law Abstract on April 23, 1958 (2 weeks after the filing of the petition for certiorari, 3 months after the death on January 28, 1958, of the judge deciding the case, and nearly seven years after the case was decided).

Appeals for the Seventh Circuit, a judgment for the plaintiff was affirmed.

The difference in result between the *Ford* case and this case grows out of *different* contracts negotiated in *different* factual backgrounds, presented to the courts under *different* records and governed by the laws of *different* states. Such a difference does not establish the conflict of decisions which the petitioner asserts or which this Court requires to grant a writ of certiorari. (Cf. *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202.)

In its opinion the Court below expressed complete agreement with the Court of Appeals for the Seventh Circuit with respect to the legal principles controlling contract interpretation and made it perfectly clear that any differences in result between the two cases were compelled by differences in facts as disclosed by the records, and not by any conflicting views as to law.

That there is no conflict between the decision of the Court of Appeals in this case and that of the Court of Appeals for the Seventh Circuit in the *Ford* case is apparent from the following analysis which the Court below made of the *Ford* case:

> "The Court ruled, and we believe properly so, that the allegations of the complaint that the Ford Company did 'dismiss from its services and terminate the employment of' the plaintiff in violation and breach of the collective bargaining agreement, stated a cause of action. * * * The case was sent back to the District Court to afford the defendant an opportunity to answer the complaint. Following the filing of an answer and a trial in the District Court, the District Judge, in an unreported opinion, ruled that the Ford Company had 'not demonstrated that it designed and employed any uniform retirement plan which might have justified' the plaintiff's dismissal, and gave judgment for

the plaintiff. This ruling was affirmed on the second appeal. We construe the two opinions together as holding that *in the absence of an established, bona fide, uniform retirement plan, the Company could not 'discharge' an employee without cause 'by the simple expedient of saying that the employee had been retired,* and in that manner avoid the consequences of breaching a contract which prohibits discharge except for cause.' 194 Fed. (2d) at p. 1003. We have hereinabove indicated our agreement with such a ruling. *The present case presents a materially different situation,* in that appellee's retirement was in accordance with a well established, bona fide retirement plan, which was found by the District Judge to have been in operation for a number of years prior to the retirement of appellee." (Pet. pp. 37, 38). (Emphasis supplied.)

In short, the decisions of the two Courts of Appeals e entirely consistent, quite apart from the fact, decisive the petition for a writ of certiorari, that the two deci- ns involved different contracts and different factual kgrounds of negotiations, practices, and conduct of the ties underlying their respective contracts.

The decision below does not conflict with the decision of the Ohio State Nisi Prius Court in the General Electric case.

In *International Association of Machinists v. General ctric Co.,* 72 Ohio Law Abstract 257, the trial judge ex- ssly limited the scope of his decision by stating:

"* * * the jurisdiction of this court extends no farther than the *interpretation* and enforcement of *this particular contract.* It is our sole province to address our attention to this question." (p. 258.) (Emphasis supplied.)

In a brief opinion the trial judge found, contrary to the finding of both the District Court and the Court of Appeals in this case, that "we do not have here a case of retirement. Instead, we have discharge because of age." (p. 258.) This finding was made in the light of an effort by General Electric Company to *originate* a plan of compulsory retirement at a newly acquired plant.

In the instant case, the Court of Appeals had no occasion either to agree or disagree with the decision of the Ohio trial court. Here, the Company was not seeking to initiate a plan of compulsory retirement. Rather, as both the District Court and the Court of Appeals found, it merely sought to enforce a uniform and non-discriminatory plan of long standing, which was well known both to the Company and the Union at the time the labor contract was signed. Moreover, here, both Courts below agreed that petitioner, in fact, was *retired* and not "discharged in the usual and ordinary sense of that term." (Pet. p. 48.)

Here, again, it must follow that mere differences in result between cases involving different contracts between different parties, and arising in quite different factual backgrounds, cannot be claimed to constitute such conflicts in decision as would warrant the granting of a petition for a writ of certiorari.

C. The decision below does not conflict with the decision of the Supreme Court of Ohio in the Toledo case.

In *State v. City of Toledo*, 142 Ohio State 123, the City sought, by municipal ordinance, to terminate the tenure of its policemen and firemen through compulsory retirement. A statute, however, provided, with respect to policemen and firemen, that "tenure * * * shall be *during good behavior* and efficient service; *but* any such officer * * * may be removed for" certain specified grounds enumer-

ated in the statute. The Legislature, in so specifying those grounds for which policemen and firemen might be removed, did not include retirement because of attained age.

In the *Toledo* case, the Supreme Court of Ohio did not have under consideration any question of contractual construction. Rather, it dealt only with the *power* of a municipality to act at all in a field which had been preempted by state legislation. Thus, it stated, "the sole question for determination is the validity of the ordinance. * * * If the respondent city possessed *the power* to enact this ordinance, it is valid." (p. 127, emphasis supplied.)

In deciding that the ordinance was invalid, the Court simply held that when a *state statute* guaranteed to policemen and firemen a lifetime tenure of office, *subject only* to certain exceptions specified by the Legislature, a *municipality* was wholly *without power* to add new and different exceptions to such tenure.

The case has nothing whatever to do with the proper construction of a private contract or the legal rules by which such construction shall be affected. It furnishes no guide and establishes no rules by which a court may determine what the parties to such a contract intended to cover by language used in their fairly negotiated agreement.

In the case decided by the Court below there was no question about the *power* of the parties to contract. The only question to be decided was what was the intendment of the language used by the parties to the agreement in the light of the background in which their contract was laid. The power, or lack of power, of the City of Toledo to terminate the life tenure of its policemen and firemen furnished no aid to the Court below, and certainly could not, in any way, be deemed controlling of its decision.

D. The Petition does not disclose any other basis for a writ of certiorari.

The decision of the Court of Appeals correctly recognized that the Labor Management Relations Act has no bearing whatever on the question of contract interpretation here involved. The decision properly stated that the Act "does not compel the making of any agreement whatsoever * * * nor does it regulate the substantive terms * * * about which an agreement may be reached," or "deprive the Company of its common law right to hire and fire at will until such an agreement was reached." (Pet. pp. 31, 32.) Accord *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386.

The Court of Appeals did not, as the petitioner suggests (Pet. pp. 16-17), misconstrue or misapply the decision of this Court in the *Williams* case. The Court merely used the *Williams* case as an illustrative citation in connection with two of its own conclusions, both of which were correct:

(a) That "failure to reach an agreement [with the Union about compulsory retirement] did not deprive the Company of its common law right to hire and fire" (Pet. p. 32). Accord *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1.

(b) *That under the record in this case* "the conclusion seems inescapable that while the Company and the Union were never in agreement about the Company's policy of compulsory retirement, the Union nevertheless recognized that it was not covered by the 1945 contract and was a matter to be included in the collective bargaining negotiations in the future" (Pet. p. 35), just as the *Williams* case recognized that red

caps were not covered by an existing labor contract, but that their inclusion was a matter for agreement through bargaining in the future.

The decision of the Court of Appeals for the Seventh Circuit, in *Inland Steel Co. v. N. L. R. B.*, 170 F. 2d 247, holding that an employer has a duty to bargain with the Union about pensions, is not in point and clearly not in conflict with the decision of the Court below. The Company's duty to bargain is not involved in any way in this case. The petitioner, in his argument, forgets that the Labor Act, in imposing a duty to bargain, specifically provides that such duty carries with it no obligation to agree.

No matter how complicated petitioner may seek to make it, the basic question tendered by the petition is simply one of the proper interpretation of an ordinary labor contract. Whether, and to what extent, the parties intended by their contract to deal with tenure of employment is but an aspect of this problem.[5] By definition a question of general importance can hardly include a mere question of contract interpretation. The contract expired more than nine years ago, a fact which emphasizes the restricted effect of the decision of the Court below. The fact that other suits involving the same contract and question are pending or possible cannot alter the fact that the case presents only a question of the interpretation of a labor contract which expired long ago.

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[5] In deciding this question of construction adversely to petitioner's claim, the Court of Appeals, as it was bound to do, followed Ohio law. The District Court did not. (cf. text in connection with footnotes 2 and 3.)

CONCLUSION.

The decision of the Court of Appeals is correct. It is not in conflict with the decision of any other Court of Appeals or of any Ohio Court. The question of contract interpretation involved is important only to the litigants.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FILED
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HAROLD B. WILLEY,

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 842.

SIM L. NICHOLS,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
Respondent.

REPLY BRIEF OF PETITIONER.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9647

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 842.

SIM L. NICHOLS,

Petitioner,

vs.

UNITED STATES STEEL CORPORATION,

Respondent.

REPLY BRIEF OF PETITIONER.

In respondent's Statement of the Case, it is asserted that the various labor contracts of 1937, 1941, 1942 and 1945 refer to *discharge* but they make no reference to *retirement* despite the fact that the Company *continuously maintained* and *enforced* its plan of compulsory retirement with *full knowledge* of the Union. To this statement, your Petitioner replies:

(1) The evidence is undisputed that the policy of compulsory retirement at age 65 was not adopted until January 1, 1941; it was discontinued in September, 1942 and was not reinstituted until August 18, 1945. *It was not being enforced and maintained on March 13, 1945, when the contract under consideration was executed.* (R. 139a-140a.)*

* The District Court found:

"While there is evidence that the defendant had a somewhat flexible retirement policy from 1931 to 1941, the policy of compulsory retirement at 65 was adopted in 1941. However, it appears to have been suspended, or modified, during the war emer-

(Continued on next page)

(2) While Respondent designates the termination of Nichols' employment as *retirement*, no facts are set forth to demonstrate that he was in fact retired. No facts are stated to refute Nichols' contention that his so-called retirement was merely *discharge in disguise*.*

(3) While it is true that the contract makes no mention of retirement, the Company sought to include a clause providing for compulsory retirement at age 65. The Union rejected it. It was always the Union's position that so long as such clause was not written into the contract, the Com-

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(Continued from preceding page)

gency. Thus, it will be seen that for four or more years of the existence of the alleged inflexible compulsory retirement policy the evidence is that the Company had modified the policy to the extent of rehiring, stripped of rights, employees who had been shortly theretofore retired at 65. If plaintiff was supposed to have had some knowledge or implied understanding of a fixed retirement policy he could not, as it seems to me, be expected to understand that the Company had only temporarily, for the duration of the war emergency, departed from its compulsory retirement policy." (Pet. p. 46.)

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* The District Court found:

"I think there is no question that the word 'discharge' has a different meaning than 'compulsory retirement' and I do not hold that the plaintiff was discharged in the usual and ordinary sense of that term. But his employment was effectively and forcibly terminated without any cause expressed or contemplated by the labor agreement, and in breach of his rights.

"The legal and practical effect of compulsory retirement is the same as a discharge and therefore, as it seems to me, there was no contractual ground upon which to base the forcible termination of the plaintiff's contract. The plaintiff cannot thus be deprived of his right to rely upon the contract as providing the only means by which his employment could be terminated. Inland Steel Company v. National Labor Relations Board, supra; United Protective Workers of America v. Ford Motor Co., 194 F. 2d 997; International Association of Machinists v. General Electric, 24 L. R. R. M. 2527 (Cuyahoga County Common Pleas)." (Pet. p. 48.)

any had no right of compulsory termination of employ-ent because of age 65. (R. 269a-276a.)*

At page 4 of Respondent's brief, a part of the syllabus *Merchants National Bank v. Cole*, 83 Ohio State 50, is uoted; the part quoted would imply that the law of hio is that surrounding circumstances may be shown explain a written contract. The complete syllabus sets rth the correct statement of the law which is something ntirely different: where the written contract is *equivo-l* or *ambiguous*, parol evidence is admissible to explain e writing:

> "*An unlimited guaranty in the absence of words showing that it was intended to be continuing is equivocal*, and the surrounding circumstances may be proven, not to contradict or vary the terms of the writing but, to enable the court to put itself in the place of the parties the better to understand the terms employed in the writing and to arrive at the mutual intention of the parties." (Emphasized portion omitted in respondent's brief.)

In the case at bar, no claim has been made that the ntract is equivocal or ambiguous and therefore parol

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* The District Court found:

"Although MacDonald, a high Union official, in his deposition as somewhat evasive on cross-examination, his statement of the nion's position that *the contract did not justify the retention by e Company of a right to compulsory retirement*, corroborates e position taken by plaintiff's witness Schremp who had orked for the defendant twenty-eight years and also was a ember of the Union Grievance Committee during the years volved in this proceeding, and, as I think, more likely reflects e real position of the Union than that testified to in deposition defense witness Stevens in his notes as to what Philip Murray d him; and Murray's statement in the 1946 Convention came er the event and could not, in my view, be controlling as to e plaintiff's rights—by this I mean the plaintiff's rights under e 1945 contract and not his right to bring suit." (Emphasis rs.) (Pet. p. 47.)

evidence is not admissible to vary its terms. (Pet. pp. 19, 20.)

In the footnote at page 5 of Respondent's brief, there appear excerpts from the Opinion rendered by the District Court which likewise inaccurately reflect the thought of the Court. What the District Court said was this:

> "*If that defense should be sustained,* the matter of notice of or acquiescence in a practiced policy of compulsory retirement is of no consequence.
>
> "*If the foregoing is the right answer I think all the proffered evidence of the defendant* as to prior and subsequent successive labor contracts containing no restriction upon or mention of the alleged compulsory retirement policy of the Company, and the proffered evidence tending to show the understanding, knowledge and acquiescence of Union leaders or representatives in the retention or reservation of the retirement policy of the Company have limited relevancy; if, indeed, such evidence is relevant at all *it must be related to two things which I think would have to be established to make such defense effective: (1) that the knowledge of the Company's retirement policy was brought to the attention of the plaintiff,—through the Company officials or its responsible employees, or through the responsible representatives of the Union Local; (2) that having such knowledge, plaintiff be said to have acquiesced in such policy by continuing as a member of the Union with knowledge that there was nothing in the labor contract protecting him against the right of the Company to enforce its retirement policy.*" (Pet. p. 45.) (Emphasized portion was omitted in Respondent's brief.)

Chief Judge Jones was referring to Respondent's defense that compulsory retirement at age 65 was a common law right reserved to the employer:

> "I had supposed, until now, that a bargaining agreement expressed the complete obligations and

rights of the parties relating to employees, including conditons and tenure of employment, and conditions respecing means for termination of employment; but here it is pressed upon me that any method of terminating employment, such as compulsory retirement, not expressed in the agreement is retained by, or reserved to the Company, and this without notice to or knowledge of the employee, who is, on the contrary, charged with implied knowledge of the reservation. This is, as Professor Lehosky testified, the theory of collective bargaining and the interpretation adopted in arbitration of labor disputes. The defendant's claim that this was the interpretation accepted and aquiesced in by Union leaders and responsible Union representatives again seems to me to be inconsistent with the testimony and evidence of Mr. Hobby in the examples submitted of grievance procedure based upon compulsory retirement. In such cases, the Union representative uniformly supported the employee's claims to relief." (Pet. p. 43.)

At page 6, respondent quotes the court below on the proposition that compulsory retirement was not inadvertently overlooked in executing the March 13, 1945 contract. It was not. The Company sought such clause, the Union rejected the proposal and it was omitted. (R. 278a.)

Nor is there any evidence to support the conclusion of the Cout below that the parties construed the contract as reserving such right to the Company. David MacDonald, president of U.S.A.-C.I.O. International testified that the Union always took the position that the Company had no such right in the absence of a contract clause (R. 276a); he was corroborated by Paul Schremp, president of the Lorain local of the Union for many years (R. 215a).

Respondent's brief at pp. 8-9 quotes from the opinion of the court below construing the *Ford Motor* cases as holding that Ford failed to prove a bona fide retirement plan and distinguishing the instant case from the *Ford* cases on that basis. In so doing the Court below misconstrued the opinions rendered by the Seventh Circuit and by the Illinois District Court. Those courts found that Ford did have a bona fide retirement plan, that Orloski contributed to it, but that it was not a valid or sufficient defense because Orloski was not notified of the *terms* of the retirement plan and specifically of the provision for compulsory retirement at age 65. (Pet. pp. 8-12.)

Respondent's brief at page 10 incorrectly states that District Judge Jones agreed that Nichols was retired. Chief Judge Jones found to the contrary and cited the *General Electric* and *Ford* cases as authority. (Pet. p. 48, footnote * page 2 of this brief.)

Respondent argues that different contracts were involved in the *Ford Motor* case and the *General Electric* case and that therefore those cases have no application. It is true that different contracts were involved but the contracts contained *similar* clauses as to *seniority* and *management* rights. The contracts in those cases, as in the case at bar, were *silent* on the subject of *compulsory retirement* at age 65.

We do not urge that the same contracts were involved; we do urge that the same principles of law were involved in those cases, as in the case at bar. Likewise with the case of *State v. Toledo,* 142 O. S. 123. The principle of law enunciated by the courts in those cases conflicts with the statement of the law made by the Court below in the instant case. It is to resolve those differences as to substantive law that we petition for the certification of this case.

The doctrine of *stare decisis* relates to the settlement of points of law. The parties are different and the facts may vary—but the principle of law remains the same.

To the respondent's contention that this case involves an unimportant question of contract interpretation, we reply that the question involved is not limited to this particular case, but effects the rights of hundreds of thousands of other employees working under existing labor contracts containing similar seniority and management clauses.

The fundamental principle of law running through the cases here involved is of nationwide importance today: Do the seniority clauses of collective bargaining contracts give the worker job security while in good health and able to perform the work, as stated in the contracts, or does the employer retain undisclosed common law rights, such as the right of compulsory termination of employment at age 65, which may be enforced by the employer at such time as he considers opportune?

It is a problem of wide-spread and immediate importance to thousands of workers today whose rights will remain uncertain and unsettled until this Honorable Court determines the conflict resulting from the decision rendered by the Court below which is in direct opposition to the decisions rendered by the Seventh Circuit and the Ohio Courts.

Respectfully submitted,

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31/21

No. 842

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No. 12,332.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

UNITED STATES STEEL CORPORATION,
Defendant-Appellant,

vs.

SIM L. NICHOLS,
Plaintiff-Appellee.

MOTION FOR HEARING EN BANC
and
PETITION FOR REHEARING.

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No. 12,332.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

UNITED STATES STEEL CORPORATION,
Defendant-Appellant,

vs.

SIM L. NICHOLS,
Plaintiff-Appellee.

MOTION FOR HEARING EN BANC and PETITION FOR REHEARING.

MOTION FOR HEARING EN BANC.

Now comes Sim L. Nichols, Plaintiff-Appellee, and respectfully moves this Court that the following petition for rehearing be heard en banc and that oral argument be permitted upon said petition for rehearing. These requests are made for the following reasons:

1. The majority opinion of the Court appears to have as its basis an erroneous concept of the evidence and of the findings of the trial court on material issues.

2. The majority opinion rendered by this Court appears to have ignored the law of Ohio relating to the decisive issues involved in this case and appears to be in conflict with the law of Ohio upon those issues.

3. The majority opinion in this case appears to be in conflict with the rule stated by the Seventh Circuit on the same questions of law.

4. The questions of law involved are novel and of far reaching importance; there are many other pending ac-

tions in the District Court involving the same issues; further, a clarification of the Court's decision is essential for the proper consideration of those cases by the District Court.

5. The matters involved are of such importance as to require an appeal to the United States Supreme Court in the event of an adverse ruling and, therefore, it is respectfully submitted should be considered by all members of this Court before consuming the time and effort of the Supreme Court.

PETITION FOR REHEARING.

Your Petitioner respectfully submits that he has been aggrieved by the majority opinion of this Honorable Court rendered herein on the 25th day of January, 1956, in the respects hereinafter set forth and prays for a rehearing of this case.

I. The Majority Opinion of the Court appears to have as its basis an erroneous concept of the evidence and the findings of the trial Court on material issues.

The National Tube Company instituted its policy of compulsory retirement at age 65 on January 1, 1941 and suspended the policy in August, 1942. It was not being enforced on March 13, 1945, so that it was in actual operation for only 17 months prior to March 13, 1945, the date of the contract, and was not being enforced on the date the contract was made. *Its terms were never disclosed to the employees or to the Union* (213a, 219a, 220a, 267a). It was secretive and enforced only when it was to the company's advantage (366a).

The company sought unsuccessfully in 1941 and 1942 negotiations to have a clause relating to compulsory re-

tirement at 65 included in the contract. The Union successfully opposed and consistently maintained the position that as long as the company did not have such a clause in the contract, it had no such right (262a, 270a).

It was *not an issue at the time the March 13, 1945 contract* was *negotiated* because it was not then being enforced (389a).

The defendant has urged, and apparently successfully to this Court, that the Union was not opposed to compulsory retirement at 65 but wanted retirement tied to a pension plan. The undisputable facts are to the contrary (262a, 270a). The Union policy was: adequate pension—compulsory retirement shall not be permitted (278a). A pension plan was established on November 11, 1949. Yet, compulsory retirement at age 65 has never been written into the collective bargaining agreement. It was completely abandoned in 1948.

We respectfully submit that this Honorable Court has made findings of fact not supported by the record and has misconstrued the findings of fact made by Chief Judge Jones. We refer to the following:

Chief Judge Jones did not find that "appellee's retirement was in accordance with a well established, bona fide retirement plan." He did not find that there was in existence "a well established, bona fide retirement plan." Nor did he find that the defendant's compulsory retirement plan "had been in operation for a number of years prior to the retirement of appellee." Chief Judge Jones' findings on these matters were:

> "While there is evidence that the defendant had a somewhat flexible retirement policy from 1931 to 1941, the policy of compulsory retirement at 65 was adopted in 1941. However, it appears to have been suspended, or modified, during the war emergency.

Thus, it will be seen that for four or more years of the existence of the alleged inflexible compulsory retirement policy the evidence is that the Company had modified the policy to the extent of rehiring, stripped of rights, employees who had been shortly theretofore retired at 65. If plaintiff was supposed to have had some knowledge or implied understanding of a fixed retirement policy he could not, as it seems to me, be expected to understand that the Company had only temporarily, for the duration of the war emergency, departed from its compulsory retirement policy."

Concerning the viewpoints of labor and management on compulsory retirement, this Honorable Court has found that "no contention was made that such an issue was already covered by the existing section dealing with rights of management." David McDonald, then president of United Steelworkers of America, testified:

"Q. I think you and I might agree for the purpose of this examination only that there is nothing in these contracts, any of them, which specifically says the Company is hereby granted the right to compulsorily retire employees at an attained age? A. That's correct.

Q. Can we not also agree there is nothing in these contracts which specifically restricts the Company to compulsorily retire employees at an attained age? A. I cannot agree with that.

Q. You think the discharge provision restricts them? A. I think the Management clause restricts them—does not grant them the right to retire people.

Q. I have agreed with you that there is no specific grant of the right and I also formally ask you to agree with me that there is no specific restriction. (456) A. I cannot agree with you on that. I contend that by not granting them the right, they did not have the right." (276a.)

Chief Judge Jones' finding was:

> "In any event, by the clearest principles of contract interpretation the general provisions of the management clause could not prevail over specific provisions in the contract relating to tenure of employment. This is true especially in the present case since there was no *effective or satisfactory evidence that the Union and aggrieved employee had agreed to, or acquiesced in, the Company's retirement policy as a management prerogative, or that the parties had so interpreted the agreement by their conduct.*" (Italics ours.) (401a, see also 387a.)

Concerning the disposition of the grievances which were filed under the 1941 and 1942 contracts, this Court makes a finding that they were disposed of favorably to the company's position:

> "During 1941 and 1942, Union representatives meeting with representatives of management unsuccessfully protested the enforcement of the rule by the Company. During 1942, grievances of employees Kordelshi, Byrer and Hermann, based on retirement for age, were disposed of favorably to the Company's policy."

We submit that such a finding is not sustained by the record. That was the opinion expressed by the defendant's witness Hobby, but the testimony of Paul Schremp, president of the Local Union, to the contrary, is substantiated by documentary evidence:

> "Q. So that these grievances became settled at the 4th Step in accordance with Company's position, didn't they?
>
> A. Oh, no, they just laid there because there was no place else to go with them." (Cross Examination, 223a.)

Mr. Schremp explained that under the 1941 and 1942 contracts since the company refused to go to arbitration there

was nothing further that could be done with relation to these grievances (214a). The two contracts are in evidence. The agreement of April 1, 1941 (Defendant's Exhibit F (314a)) provides:

> "Grievances not satisfactorily settled in Step 4 shall, in the absence of mutual agreement in writing to the contrary, be appealed to an impartial umpire to be *appointed by mutual agreement* of the parties hereto." (320a.)

The agreement of September 1, 1942 (Defendant's Exhibit G (323a)) provides:

> "* * * such grievance may be appealed by either party to an impartial umpire to be *appointed by mutual agreement.* * * *" (331a.)

The union requested the selection of an impartial arbitrator and the company refused (Defendant's Exhibit T, 371a). As Mr. Schremp testified, since the company refused to go to arbitration, there was nothing more that could be done with respect to these grievances (214a).

As to the grievances which were filed under the March 13, 1945 contract, there were 32 such grievances filed in 1946 and 1947. In 1950, 26 of these grievances were settled favorably to the employees and the other six were withdrawn (218a, 219a, Plaintiff's Exhibit I, 357a).

This Court found that the 1941-1942 grievances were *disposed* of favorably to the company. The only *disposition* that the record shows to have been made of any of these grievances was in the first four steps of the grievance procedure. In each of these steps, the *disposition* was made by a *plant official.* It is not until arbitration that an impartial person considers the grievance. The company consistently held that the matter was not arbitrable and refused to go to arbitration. We submit that Chief Judge Jones' finding was eminently correct that "The retired

employee had not the slightest chance of remedial consideration * * *."

At page 9 of the Court's opinion, it is held that "'The Company would not be justified in discharging" under certain circumstances. The instant case comes within the terms of this Court's opinion because:

(a) The retirement policy was "enforced in order to effect what was actually a discharge under the guise of retirement." What actual facts exist in the case at bar to constitute a legal or lawful "retirement." Nichols' employment was terminated against his will and without his consent, he received no pension (which is a *sine qua non* of retirement), and the time of ending his employment was without choice on his part. The company's designation of "retirement" as applied to Nichols is absolutely and clearly no more than a "guise" to avoid liability for an actual discharge.

What facts can the Court find in this record to be the basis for finding that Nichols was "actually retired"? The fact that the Company may have retired other employees under its alleged policy, cannot logically be a basis for finding that Nichols was "actually retired" and not "discharged."

(b) The actual facts in connection with Nichols' "discharge" reveal clearly that the "so-called retirement policy" was purportedly enforced when, as supplied to Nichols, it "was in substance merely a subterfuge to avoid its contractual obligation against discharge."

This Court seems to find that the District Judge found that *only* the "end result of discharge and compulsory retirement was the same, namely, termination of employment." Although the District Judge held that "the legal and practical effect" was the same, we submit that he also intended to find and hold that the action taken by the com-

pany with respect to Nichols was a discharge without proper cause within the meaning of the contract.

We respectfully submit that Chief Judge Jones' findings are sustained by the evidence in the record and that the findings made by this Court on these points are not justified by the evidence.

Under Rule 57, findings of fact by the trial court should not be set aside unless clearly erroneous. Chief Judge Jones' findings, we submit, were not clearly erroneous but are substantiated by the record. Furthermore, we raise this question: Can the findings of Chief Judge Jones be clearly erroneous when one judge of this Court would affirm his findings? We respectfully submit this question to this Honorable Court for its consideration as a fundamental challenge of the correctness of this Court's action with reference to the findings of the District Court.

II. The Majority Opinion rendered by this Court appears to have ignored the law of Ohio relating to the decisive issues involved in this case and appears to be in conflict with the law of Ohio upon those issues.

1. The majority opinion rendered in this case revolves around the interpretation of the language of the contract but fails to take into consideration the law of Ohio with respect to the interpretation of such a contract. In the majority opinion, no consideration whatsoever is given to the Ohio law upon the subject although there is, in fact, Ohio law directly in point. This would appear to be in violation of the rule stated in the case of *Erie R. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487 (1938) which makes it mandatory upon the federal courts to follow the local rule in matters of common law. The federal courts must follow the local law in an action

for wrongful discharge based on a collective bargaining agreement. *Transcontinental & Western Air, Inc. v. Koppal*, 345 U. S. 653 (1953).

Essentially the same problem that is before this Court was before the Ohio court in the case of *National Association of Machinists v. Electric Vacuum Cleaner Division, General Electric Company*, 24 L. R. R. M. 2527.

In the *Vacuum Cleaner* case, there was an effective labor contract and during the life of that contract the employer sought to "retire" its male employees, who attained the age of 65 years, the company asserting that it had a common law right to do so and that the contract did not limit that right. The language to be construed in that case was the seniority clause of a collective bargaining contract, which is indistinguishable in language from that in the contract in the case at bar. In that case, the contract set forth specific grounds for discharge. The employer terminated the employment of several employees because they had reached the age of 65. An injunction was sought. The employer contended that termination of employment because of age is not discharge. The Ohio court held otherwise.

That contract provided, as does the contract of March 13, 1945, that continuous service may be terminated if the employee voluntarily quits or is discharged:

> "Article X of the contract provides:
>
> "1. An employee's continuous service with the company shall be terminated:
>
> "A. If an employee leaves voluntarily or is discharged." 24 L. R. R. M. 2527.

The employer's position, as in the case at bar, was that the employee was not discharged:

> "Instead, it is claimed that they are retired."

What does "retire" mean? Does it merely mean termination of employment because of age, or does it connote something more than that? Does it mean termination of employment upon a pension and under a pension plan to which the employee has acquiesced?

Was Nichols retired? Judge Baumann gave careful consideration to the meaning of the word. He said, "Certainly in the popular sense, to retire implies at least part of the motive power creating the resultant situation originated in the persons whose status is changed." He also considered the dictionary meaning of the word:

> "Webster defines retire as follows:
>
> " 'To withdraw from office, a public station, business or the like; as having made a large fortune, he retired.'
>
> "and defines withdraw as:
>
> " 'To disengage or remove oneself.' "

Judge Baumann considered the meaning of the word not only in its popular and technical sense, but also as used in labor relations.

> "In employee-employer relationships some consent by the employee either at the inception or at some time during the course of his employment. It may be participation in a pension plan. It could be by specific agreement. We do not have here a case of retirement. Instead, *we have discharge because of age.*"

We respectfully submit that this Honorable Court in its opinion has not considered whether the elements essential to constitute retirement have been established. Nichols received no pension, he did not know of compulsory "retirement" at 65, he did not acquiesce, the plan was not published.

2. This Court has ruled that, unless the contract specifically prohibits compulsory retirement, such a common law right continues to exist. The *Vacuum Cleaner* case holds diametrically to the opposite:

> "The company asserts that it has a common law right to select its employees as it sees fit, and that the contract does not limit its proposed action."
>
> "We construe this contract to prohibit the termination of continuous service except as specified. 'Expressio unius est exclusio alterius.'"

This Court holds that the omission of a company sought clause permitting compulsory retirement permits the company the right of compulsory retirement nevertheless. The *Vacuum Cleaner* case holds exactly to the contrary:

> "The omission of a company requested clause from the final contract does not weaken this conclusion. The provisions of Article XVI fortify it."

3. At page 6 of the majority opinion, this Court states:

> "Appellee throughout his argument contends that the contract provides that employment could be terminated only for proper cause and that reaching the age of 65 is not proper cause. If the contract so provided, that might well be the end of this case. But we do not find such a provision in the contract."

We humbly submit that the Court has misconstrued the appellee's position. The appellee's position on this matter is stated at pages 47 and 48 of his main brief. The appellee's position, in short, is this: That Nichols' employment can be terminated only in the manner provided in the contract. The seniority clause of the contract, Section 8, guarantees job security as long as the man is able to work and is physically fit; and continuous service is to be

broken only for the grounds specified, including quitting or discharge (288a). It is this seniority clause which specifies the causes for termination of employment. The management clause, Section 10, provides for discharge for proper cause or other legitimate reason. The management clause must be construed in conjunction with the seniority clause. It is the position of the plaintiff that the specific provisions of the seniority clause relating to tenure of employment prevail over the general provisions of the management clause.

Further, that the management clause itself has been and is construed by the Union as prohibiting discharge for reason of age alone.

This was the interpretation made by Chief Judge Jones on the motion to amend the findings and for additional findings (401a).

> "In any event, by the clearest principles of contract interpretation the general provisions of the management clause could not prevail over specific provisions in the contract relating to tenure of employment. This is true especially in the present case since there was no effective or satisfactory evidence that the Union and aggrieved employee had agreed to, or acquiesced in, the Company's retirement policy as a management prerogative, or that the parties had so interpreted the agreement by their conduct." (401a.)

This was the position taken by Judge Baumann in the *Electric Vacuum Cleaner* case:

> "We construe this contract to prohibit the termination of continuous service except as specified. 'Expressio unius est exclusio alterius.' " 24 L. R. R. M. 2527.

The Supreme Court of Ohio clearly disagrees with the conclusion drawn by this Court that discharge and

compulsory retirement at 65 are different things. In the case of *State ex rel. v. Toledo*, 142 O. S. 123, 130, it is stated:

> "By whatever name it may be called, removal or retirement, an ordinance interfering with such tenure is inconsistent with the provisions of the statute and cannot be sustained."

4. The majority opinion ignores the law of Ohio as relates to the effect of claimed custom upon the terms of a written contract. The policy of compulsory retirement at 65 can vary the terms of the written contract only if it reaches the legal status of a custom. Under the law of Ohio, a policy or practice does not reach the status of a custom unless it is *long continued without interruption, known to those affected,* and *peaceably acquiesced in.*

> *Steamboat v. Wayne*, 16 Ohio 513 (1847);
> *Insurance Co. v. Harmer*, 2 O. S. 452 (1853);
> *Krause v. Oscar Daniels Co.*, 61 O. Appeals 337 (1939).

This is the general rule: 5 *Am. Jur.* 267.

The evidence in this case shows that compulsory retirement at age 65 was commenced by The National Tube Company in January, 1941 and discontinued in September 1942 (139a). It was reinstituted on August 18, 1945 (140a). Nichols was discharged on May 18, 1946. So, the policy was *continuously* in effect for only 11 months prior to the time of his discharge. It was not in effect on March 13, 1945 when the contract became effective, nor for 2½ years prior to that date. The record being what it is, we find it difficult to reconcile it with the statement made at page 7 of the majority opinion that *"the evidence shows without question that over a period of years prior to the March 13, 1945 contract, such policy was actually in force*

* * *." We reiterate—on March 13, 1945, the date the contract in issue was negotiated, the policy of compulsory retirement at 65 was not being enforced. Therefore, we humbly submit that the Court's opinion is based upon an erroneous assumption of fact on a very basic factual issue.

In addition to the fact that compulsory retirement at 65 was *not long continued without interruption, it was not known to those affected.* It was the uncontradicted testimony of Nichols that he did not know of such policy (46a) and such was the finding of Chief Judge Jones. Nor was it known to the various other employees who testified that they understood retirement was voluntary upon pension after 25 years service (247a, 250a, 252a, 253a, 256a, 259a).

Nor was it peaceably acquiesced in. It could not be acquiesced in by Nichols because he did not know of it. It *was not acquiesced in by the Union.* See the testimony of Paul Schremp (217a) and David McDonald (278a). That the Union objected to it is apparent from the various grievances filed. The company witness Hobby testified that the Union consistently took the position that compulsory retirement at 65 was in violation of the contract provisions (139a).

5. Even if it be found that compulsory retirement at 65 by the National Tube Company was an established custom, it could not be used to vary the terms of the unambiguous contract.

Cincinnati v. Gas Co., 53 O. S. 278.

This very case and this same principle of law was urged by the appellant's counsel in the case of *National Assn. of Machinists v. Electric Vacuum Cleaner Division, General Electric Company.* The court followed that principle of law and construed the contract within its four-

corners and held that under the ancient doctrine of law, the grounds for termination of employment having been specified in the contract, all other grounds are excluded. Compulsory retirement at 65, not being specified in the contract, the Court ruled it to be an unlawful termination of employment.

It is inescapable that the majority decision of this Honorable Court does not follow the rule of law thus stated by the Ohio Courts.

III. The Majority Opinion is in conflict with the opinions rendered by the Seventh Circuit on the same questions of law.

1. Where a collective bargaining contract between employer and union provides that an employee can be discharged only for cause, and contains no specific provision concerning retirement age, compulsory retirement of an employee at age 65 accomplished termination of employment without just cause in violation of contract. *United Protective Workers and Orloski v. Ford Motor Co.*, 194 F. 2d 997, 223 F. 2d 49.

Ford Motor put into effect a policy of compulsory retirement at 65 in 1945, together with an *annuity plan*, which *was published* and distributed among its employees. *Orloski joined the plan in 1947* but never received a copy of the plan and did not know of its provisions. He was "retired" in 1949.

Ford Motor urged:

(1) A common law right to compulsorily retire employees at 65.

(2) The collective bargaining contract did not cover the matter of compulsory retirement.

(3) An established policy of compulsory retirement at 65.

The District Court ruled in its favor and the Appellate Court reversed.

Ford contended that it had a common law right to adopt the policy of compulsory retirement at age 65:

> "Ford is contending in this Court that it had the common law right to adopt a policy of compulsory retirement of its employees at the age of sixty-five; that it did adopt such a policy; that, pursuant to that policy, Orloski was retired; and that as a part of that policy it entered into a Group Annuity Contract with Equitable." 194 F. 2d 997 at 1002.

In the *Orloski* case, the contract had both a seniority clause and a management clause similar to the clauses in the case at bar:

> "Paragraph (1) of the contract designates the union as the exclusive bargaining agent for the plant protection employees of Ford. Paragraph (14) provides rules and conditions for determination of seniority. By paragraph (16) the parties agree that seniority, after it is determined and posted, shall not be changed without notification to and consultation with the union. Paragraph (22) states six different reasons for which seniority shall be broken, including the employee's quitting or being discharged and the discharge not being reversed through grievance procedure. Paragraph (23) provides that the 'order of layoff and rehiring shall be governed by first, seniority and second, ability,' but that Ford shall consult with the union before deviating from strict seniority. The contract also provides that the right to discharge is the sole responsibility of management but that claims of unjust discharge shall be subject to the grievance procedure." *United Protective Workers of America v. Ford Motor Co.*, 194 F. 2d 997 at 1002.

Ford claimed that Orloski was retired pursuant to its general plan to retire all employees at 65, the termination of Orloski's employment

"* * * Ford now asserts was pursuant to a general plan to retire all employees at the age of sixty-five, a plan which Ford now insists that it had a right to, and did, unilaterally adopt." 194 F. 2d 997, at 1002.

The District Court agreed with Ford's contention and held that since the contract contained no specific provisions for retirement, the complaint failed to state a cause of action.

"The District Court held that the union had the right to bargain collectively with respect to pension and retirement plans and that a provision covering the retirement age 'should be included specifically in the contract'; that, since the contract contained no specific provision concerning retirement age, the complaint failed to state a cause of action * * *." 194 F. 2d 997 at 1003.

Ford urged, as does the National Tube Company, that in the absence of a contract provision, Orloski had no right to be retained in employment. Ford urged that compulsory retirement is not discharge, as does the National Tube Company in the case at bar, but the 7th Circuit disagreed with that contention and held that the phraseology is immaterial, that it is reality that counts—whether you call it termination because of age, or discharge—the man's employment has ceased. That Court's ruling on this subject cannot be reconciled with the holding of this Court that compulsory retirement at age 65 and discharge are, in fact, different things.

"The contract expressly provides that an employee may be discharged only for cause. Compulsory retirement of an employee by his employer accomplishes the same result—the employment is terminated. Certainly the employer may not terminate an employee's employment without cause by the

simple expedient of saying that the employee has been retired, and in that manner avoid the consequences of breaching a contract which prohibits discharges except for cause. A consideration of the contract as a whole convinces us that Ford's contention, that an employee's reaching the age of sixty-five is just cause for discharge within the meaning of the contract, is not tenable." 194 F. 2d 997 at 1003.

The ruling of this Honorable Court on that proposition of law is also in conflict with the decision of the 7th Circuit in the case of *Inland Steel v. N. L. R. B.*, 170 F. 2d 247 (1948):

"We are unable to differentiate between the conceded right of a Union to bargain concerning a discharge, and particularly a nondiscriminatory discharge, of an employee and its right to bargain concerning the age at which he is compelled to retire. In either case, the employee loses his job at the command of the employer; in either case, the effect upon the 'conditions' of the person's employment is that the employment is terminated. * * *"

"The tenure of employment is terminated just as effectively by a discharge for cause as by a dismissal occasioned by a retirement provision. And in both instances alike, the time of the termination of such tenure is determined by the Company. As already shown, a termination by discharge is concededly a matter for collective bargaining. To say that termination by retirement is not amenable to the same process could not, in our judgment, be supported by logic, reason or common sense. In our view, the contention is without merit." at page 252.

2. This Court holds that knowledge or consent on the part of Nichols is unimportant, yet it finds that its opinion is not in conflict with the 7th Circuit. We respectfully submit that the decisions cannot be reconciled. That Court said that in the absence of knowledge of or consent

to the company's policy of compulsory retirement, there is no basis for holding that Orloski waived his right under the collective bargaining agreement to be discharged only for cause. And upon that point of law, *the 7th Circuit cites with approval Chief Judge Jones' opinion in the case at bar,* appearing in 122 F. Supp. 726:

> "The Company argues on several grounds that Orloski was properly retired. First, it claims that he was retired under an established retirement plan in which he was voluntarily participating. However, the only positive evidence in the record indicates that Orloski did not know that the annuity contract between the insurance company and Ford provided for retirement at age 65 and that he did not consent to compulsory retirement. *In the absence of knowledge of or consent to the Company's alleged policy of compulsory retirement, there is no basis for holding that Orloski waived his right,* under the collective bargaining agreement, *to be discharged only* for cause. *Nichols vs. National Tube Co.*, D. C., 122 F. Supp. 726, 732." *United Protective Workers and Orloski v. Ford Motor Co.*, 194 F. 2d 997.

Thus we find the law to be in this amazing state: that the principle of law stated by Chief Judge Jones, that compulsory retirement at 65 could not be binding upon the employee in the absence of notice or knowledge, is the law in the 7th Circuit on the basis of Chief Judge Jones' opinion and that it is not the law in this Circuit which has specifically disapproved that proposition of law stated by Chief Judge Jones.

3. An attempt is made to distinguish the *Orloski* case on the basis of an unreported opinion of Judge Campell to the effect that Ford Motor Company "had not demonstrated that it designed and employed any uniform retirement plan which might have justified Orloski's dismissal."

That opinion must be carefully read. Judge Campbell did not find that there was no plan of compulsory retirement at age 65 at the Ford Motor Co. In fact, he found that there was such a plan, but he found that such a plan did not justify Orloski's dismissal because he was not apprised of the plan. Judge Campbell made findings that Ford Motor had instituted its policy of compulsory retirement on June 21, 1945, and that its plan was published and distributed among its employees; that Orloski joined the plan in 1947; that he did not receive a published copy; that he was discharged in 1949; and further found:

> *"Orloski was never apprised of Ford's intention to dismiss or retire him when he reached his sixty-fifth birthday. Second, it is also clear that neither Orloski nor the union was informed of the provisions of the contract between Ford and Equitable."* (Italics ours.)

It was upon the basis of the above quotation that Judge Campbell proceeded to find:

> "Ford has not demonstrated that it designed and employed any uniform retirement plan which might have justified Orloski's dismissal."

We reiterate, the only reasonable interpretation of Judge Campbell's opinion was that Orloski was not apprised of the plan and, therefore, it did not justify his dismissal. Such was the interpretation given by the Circuit Court of Appeals when that opinion came before it for review.

> "The Company argues on several grounds that Orloski was properly retired. First, it claims that he was retired under an established retirement plan in which he was voluntarily participating. However, the only positive evidence in the record indicates that Orloski did not know that the annuity contract between the insurance company and Ford provided for retirement at age 65 and that he did not consent to

compulsory retirement. In the absence of knowledge of or consent to the Company's alleged policy of compulsory retirement, there is no basis for holding that Orloski waived his right, under the collective bargaining agreement, to be discharged only for cause. *Nichols v. National Tube Co., D. C.*, 122 F. Supp. 726, 732." *United Protective Workers v. Ford Motor Co.*, 223 F. 2d 49, at 51.

Neither Nichols nor the Union was ever informed of the provisions of the company plan of compulsory retirement at 65. The Union knew there was some plan from certain complaints which came to it from members whose employment was terminated because of age 65. Nichols never knew of the plan.

How then can the two cases be distinguished on the facts?

IV. The questions of law involved are novel and of far reaching importance; there are many other pending actions in the District Court involving the same issues; further, a clarification of this Court's decision is essential for a proper consideration of those cases by the District Court.

The novelty of the questions involved in this case is recognized by the Court (Majority Opinion, p. 10). That it involves a consideration of fundamental principles of the law of master and servant is likewise recognized. (Majority Opinion, p. 4). We respectfully submit that, in view of the novelty and importance of the questions, the parties should not be left in doubt as to the findings of the court on either matters of law or of fact. As heretofore pointed out in this brief, much confusion exists. This confusion ought to be eliminated, not only for the protection of the parties in the instant case, but also because of the

fact that there are many other cases involving the same problem now pending in the District Court, and the disposition of those cases will be expedited if this confusion as to law and fact are eliminated.

This Court apparently finds the terms of the contract of March 13, 1945 to be unambiguous, yet it nevertheless has proceeded to vary the terms of that contract on the basis of its finding that the National Tube Company had a long established policy of compulsory retirement at age 65. The Court makes no reference to the law relating to the varying of the terms of an unambiguous contract by parol evidence of custom or otherwise. If it is the intention of the Court to enunciate as a principle of law that an unambiguous contract may be varied by parol evidence of an established custom or practice, then, we submit, such a rule of law would be in conflict with the decision rendered by the Seventh Circuit Court of Appeals in the case of *Anson v. Hiram Walker,* 222 F. 2d 100 (1955):

> " 'The intention of the parties must be found in the language used to express such intention; and if the court finds as a matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision.' Consequently, the rights and remedies of the parties are to be determined from the plain unambiguous words of the contract upon which suit is brought, unattended by averments of other intentions or contemplations."

It would also conflict with the decision rendered by the United States Supreme Court in the case of *Barnard vs. Kellogg,* 10 Wallace 383, 19 L. Ed. 987:

> "But the learned court below having found that by the custom of dealers in wool in New York and Boston there is a warranty by the seller implied from the fact of sale, that the wool is not falsely packed, and having held Barnard bound by it, the inquiry

arises whether such a custom can be admitted to control the general rules of law in relation to the sale of personal property.

"* * * The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it." (p. 990.)

The Court has made no statement in its opinion with relation to the proposition of law presented by the appellee that before an alleged custom can be found to exist there must be proof (a) that it was long continued without interruption, (b) that it was known to those affected, (c) that it was peaceably acquiesced in. There has been no finding by this Court of these essential requirements. Clarification is suggested.

The Court finds that the Union knew that the company was "retiring" employees at 65. Does the Court find that the Union was informed of or knew the terms of the so-called retirement plan? That was the turning point in the *Orloski* case, both the Union and Orloski knew that Ford had a retirement plan. Orloski contributed to it—but they did not know its terms. The Court held that in the absence of such knowledge, Orloski was not bound. It is not clear whether this Court agrees or disagrees with that proposition of law.

And so it is with the other issues of law and fact referred to in this petition—there is doubt and uncertainty as to the findings of fact made and conclusions of law reached, as herein outlined. We respectfully submit, that in the interest of just and orderly procedure, these matters ought to be clarified.

V. Certification Is Suggested.

Involving, as this case does, fundamental questions in labor relations and the law pertaining thereto, and recognizing, as we must, that there is a probable conflict between the thinking of this Honorable Court and that of the Seventh Circuit upon these fundamental propositions, we respectfully submit that this Court ought to consider afresh the merits of the case, and that if it still remains of the opinion heretofore expressed by the majority, then we respectfully suggest that the case ought to be certified to the United States Supreme Court under Rule 37 of the Rules of the United States Supreme Court, for instruction upon the questions and propositions of law involved.

Wherefore, petitioner respectfully urges that a rehearing may be granted, and that upon rehearing the judgment of the District Court be affirmed; or in the alternative, that this case be certified to the Supreme Court of the United States under Rule 37 of that Honorable Court upon the questions and propositions of law involved; and that the mandate of this Court may be stayed pending the disposition of this petition.

Respectfully submitted,

SIM L. NICHOLS,
BY JACOB LEVIN AND ARNOLD S. LEVIN,
His Attorneys.

I, Jacob Levin, of Lorain, Ohio, an attorney regularly admitted to practice in the United States Circuit Court of Appeals for the Sixth Circuit, do certify that in my opinion the foregoing petition for rehearing in the case of United States Steel Corporation vs. Sim L. Nichols, No. 12332, is well founded and is not presented for the purpose of creating a delay.

JACOB LEVIN.

February 10, 1956.